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SUPREME COURT OF THE UNITED STATES

No. 127

J. H. HEMLER,

Petitioner,

versus

HOPE PRODUCING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, 5TH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

G. P. BULLIS,
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American Printing Co., Ltd., 424 Camp Street



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SUPREME COURT OF THE UNITED STATES

J. H. Hemler,
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versus

Hope Producing Company,
Respondent.

No.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Petitioner, J. Henry Hemler, prays that a writ of certiorari issue to review a final judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above case, reported in 117 Federal Reporter (2d) page 231.

JURISDICTION

The jurisdiction of this Court is invoked under Judicial Code Section 240 (a); U. S. Code, Title 28 Sec. 347 (a). The judgment of the Court of Appeals was entered January 16, 1941. Petitioner applied for rehearing on February 6th, 1941, and rehearing was denied by that Court on March 8th, 1941.

QUESTIONS PRESENTED

1. May the Court of Appeals in this case decide two important questions of local law in a way in conflict with applicable decisions of the Supreme Court of Louisiana.

2. Does an appellate court depart from the accepted and usual course of judicial proceedings, and deny to an appellant due process of law, by completely failing to consider and decide the issues properly laid before that court as a basis for the appeal.

STATEMENT OF THE MATTER INVOLVED

Petitioner, a farmer, leased his farm for oil and natural gas development, under a customary and widely used lease, stipulating that lessee (respondent herein) pay to petitioner as royalty, one-eighth of the *market price* of all gas produced under the lease (Tr. 23). Under this lease, respondent drilled a well on petitioner's farm, from which much natural gas was produced (Tr. 59).

Respondent, Hope Producing Co., attempted to settle with petitioner for the royalty due him, by claiming that the market price of the natural gas so produced was 3c per thousand cubic feet (Tr. 48). Petitioner claimed that this market price was much higher, and sues in this lawsuit for the difference (Tr. 13). Hence the sole issue in this case is, how is the market price of natural gas under such leases to be determined.

The facts are almost entirely undisputed, the undisputed facts being:

Petitioner's farm and well are in and part of the Richland Gas Field, which is a definite area of land in

Louisiana, about 9 miles long and 6 miles wide, from which immense quantities of natural gas have been produced (Tr. 197).

The market in which was sold the natural gas produced in the Richland Gas Field, including petitioner's well, was as follows: all this natural gas, as it comes from the well, contains gasoline. This gasoline is first extracted in the field, and sold separately. The natural gas, with the gasoline extracted, is then sold to pipe lines which were built into the field, and which transport the natural gas from the field to distant places (including St. Louis, Atlanta and New Orleans), or a small quantity of the gas to nearby carbon black plants.

On the trial of this case in the District Court before a jury, petitioner, as plaintiff, offered in evidence all of the sales to the pipe lines, being all of the sales of natural gas made within the Richland Gas Field during the period of time involved in this suit, and claimed that the market price under leases like the lease sued on, is the fair average of these prices in these sales.

It is entirely undisputed that these sales are genuine, bona fide sales, of immense quantities of gas, being all the sales made in the field, and that the average price in these sales is between 3c and 4c per thousand cubic feet. Respondent, Hope Producing Co., admits that the average price it received for all of its immense sales of gas in the Richland Gas Field was 4.832c per thousand cubic feet (Tr. 72), altho claiming to petitioner that the market price was 3c.

Respondent, Hope Producing Co., as defendant in the District Court, claimed that these pipe line sales could not

be used to prove the market price of gas, because they were made under the following circumstances: Before these pipe lines were built into the Richland field, the pipe line companies, to justify their investment, made contracts with producers in that gas field, stipulating that these producers would deliver a continuous supply of gas to the pipe lines, over a period of years, usually ten years, at prices stipulated in advance for each year of the contract. The prices introduced in evidence by petitioner on the trial of this case, were the prices paid under these contracts in the years involved in this suit. Respondent, Hope Producing Co., contended in the District Court, and produced opinion evidence of gas company officials tending to prove, that the gas producers who sold gas to these pipe lines were put to some vague, indefinite, but strongly urged expense by reason of the fact that deliveries of the gas sold were made over a period of time instead of all at one time (Tr. 89-120). In the alternative, if these pipe line prices were used, respondent introduced the same opinion that while the amount of this expense could not be accurately ascertained, yet it would make up the difference between the 4.832c for which they sold their gas, and the 3c they paid petitioner (Tr. 68).

Next, respondent introduced and strongly urged to the jury, 865 oil and gas leases wherein various landowners in the county where the Richland Gas Field is located, but mostly outside the gas field, leased their land for oil and gas development under leases stipulating that the price they should receive as royalty, if gas was ever produced (there being no showing that any gas was ever produced under these leases), should be ⅛th of 3c per thousand cubic feet of gas produced, instead of "Market Price" as in the lease at bar in this suit. Petitioner contends that these were sales, not of gas, but of right to drill.

Next, respondent introduced in evidence, the opinions of various gas company officials that 3c was the correct market price (Tr. 85, 83).

Lastly, respondent claimed that under the lease contract sued on, the intent of the parties was that the market price should be for sales at the well where produced, and since there were no sales at the well involved in this suit, the market price should be the few, insignificant sales which were made in which pipe lines built direct to a well (not the well involved in this suit) and took the gas there, whereas almost all of the pipe line sales were made by delivery of the gas to the pipe line at central points within the field.

Petitioner objected to all of the evidence introduced by defendant as above recited, on the ground that it was irrelevant and immaterial, because the market price can be fixed only by evidence of the price received in genuine sales.

The District Court permitted all of the evidence of respondent to be admitted and read to the jury, and charged the jury that if they found any sufficient sales at any wells in the field, including the above stated leases as sales, they should disregard the big pipe line sales (Tr. 355, 356). Under this charge, the jury brought in verdict for respondent (Tr. 382).

The District Court also ruled as a matter of law that petitioner was not entitled to any royalty on the gasoline produced by respondent from the well on petitioner's land (Tr. 43), because the lease contract sued on (Tr. 22), contains no reference to the production of gasoline, and therefore does not allow lessor any royalty on gasoline.

Petitioner appealed to the Circuit Court of Appeals for the 5th Circuit from this judgment, urging as points on which he relied in the appeal (Tr. 386), all of the rulings of the District Court above stated.

The Court of Appeals rendered an opinion and decree reading in full as follows: 117 F. 2d. 231 (Tr. 401):

> "This is another appeal from a judgment on a verdict, fixing the market value of gas, in a suit for royalty arrearages on gas wells, in the Richland Gas Field. This time the verdict was against the plaintiff. Though there was a different plaintiff and defendant, and different counsel for defendant, this suit, as the others, was brought by the same counsel for plaintiff, involving the same issues, was tried before the same judge, in substantially the same way, and was submitted here on the same day with Union Producing Co. v. Pardue, and Union Producing Co. v. Driskell, this day decided.
>
> "Apparently the only substantial difference in the cases is that in the first two the defendants were appellants, and in this, the plaintiff is, and whereas the plaintiff in those cases was insisting that the jury verdict be upheld, the defendant in this case is so insisting."

Appellant recognizes this situation. In his brief he says:

> " 'Your Honors will note that this case presents identically the same facts and issues as cases Nos. 9493 and 9499, submitted at the same time. In each of these cases, the same narrow issue was presented, namely, what is the market price of natural gas at the Richland Gas Field, in Rich-

land Parish, State of Louisiana.' In the other cases, the defendants were objecting to the introduction of contracts showing sales of gas in the field. In this, the plaintiff is objecting to the introduction of leases showing prices paid for gas at the well. In those, defendant objected to the erroneous admission of opinions in evidence, here plaintiff objects. Tried upon the same principles, and in the same way, as the others, it is quite obvious that if those judgments were correctly affirmed, this one must be, unless the trial is shown to have gotten out of bounds here to appellant's prejudice. We find no such instance. Indeed, if anything, this case was tried more faithfully by the rules we have laid down than the others were. To reverse the judgment in it, would be, for the reasons set out in the Pardue and Driskell cases, this day decided, to reverse court and counsel for pursuing the course we have laid down, follow the track we have marked out, in prior opinions. Appellant's counsel, seeing clearly that this is so, without pointing out any good reason why we should, urges us to retract what we have said about market value at the well, and, plumping with him for a new measure, market value in the field, reverse the judgment because proof was taken and the jury instructed as to market value at the well. We think it plain that what we and the Supreme Court of Louisiana have said on this subject has been correctly said and we have no disposition to withdraw or depart from our former opinions. Upon the claim for the gasoline royalties made in this case, we need say nothing except to refer to and adopt what we said on a similar claim made in Pardue's case. The judgment was right throughout. It is affirmed."

It is on this opinion of the Court of Appeals that we ask review by this petition for writ of certiorari.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1.

The issues in this case are of wide general importance, because they settle the method by which a landowner can compute his royalty, and the amount of the royalty, in all leases of land for oil and gas development in which the royalty is specified as "Market Price". Such leases are very common, being the only lease in which a landowner who thinks the market price of natural gas will advance in future years, can participate in that advance. If the decision of the Court of Appeals is allowed to stand, a landowner not expert in the gas business will be helpless in obtaining the royalty which is owed to him by the expert gas companies who are always the lessees in such cases.

2.

The decision of the Court of Appeals, denying to petitioner any royalty on the gasoline produced under the lease sued on, is in conflict with the decisions of the highest local court, the Supreme Court of Louisiana, as shown by the following decisions:

Coyle v. Louisiana Gas & Fuel Co., 175 La. 990, 144 So. 737;
Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561.

Said decision also seems contrary to equity and the contract, by permitting respondent to take gasoline from petitioner's land and pay petitioner nothing for it.

3.

The decision of the Court of Appeals, denying that the market price contemplated by the parties, and the

market price to be used in this suit, is the market price in the field where produced, there being no sale at the well involved in this suit, is in conflict with the decision of the Supreme Court of Louisiana in the following cases:

Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561;
Sartor v. United Carbon Co., 183 La. 287, 163 So. 103.

4.

The Court of Appeals departed from the accepted and usual course of judicial proceedings, and denied to petitioner due process of law, by completely failing to consider or decide the issues laid before it by petitioner as appellant in that Court, as hereinabove recited.

The opinion of the Court of Appeals refers to its decision in the following cases decided the same day:

Union Producing Co. v. Pardue, 117 Fed. (2d) 225;
Union Producing Co. v. Driskell, 117 Fed. (2d) 229;

Neither of these cases involved the same issue as in the case at bar and in neither of them were any of these issues discussed, except as to gasoline in the Pardue case.

The opinion of the Court of Appeals also refers to previous decision of that Court on the same subject matter. These decisions were:

Arkansas Nat. Gas Co. v. Sartor, 78 F. 2d, 929;
Sartor v. United Gas P. S. Co., 84 F. 2d 436, 438.

In those cases, the Court of Appeals did not discuss the issues here presented, except as to the one holding that a daily market price must be shown, and in the case at bar we introduced new evidence, not before the Court in any previous case, that there can be no such thing as a daily market price for natural gas, and no such price was contemplated by the parties, which new evidence the Court of Appeals ignored.

PRAYER

Wherefor petitioner respectfully prays that a writ of certiorari issue directing the United States Circuit Court of Appeals for the Fifth Circuit to certify and send to this Court for its review and determination, a full transcript of the record and proceedings in the suit entitled J. H. Hemler v. Hope Producing Co., No. 9504 on the docket of that Court; and that finally this case be remanded to the United States District Court for the Western District of Louisiana for new trial; prays for all necessary orders and for such other relief as the Court may deem proper.

G. P. BULLIS,
Attorney for Petitioner.





BRIEF SUPPORTING APPLICATION

MAY IT PLEASE THE COURT:

We respectfully submit that it seems to us clear beyond question that the Court of Appeals has failed to follow the jurisprudence laid down by the Supreme Court of Louisiana, on important questions of local law, as follows:

1. GASOLINE

As previously stated, before the gas taken from the well on petitioner's land was sold, the gasoline content was extracted and sold separately.

It seems the height of injustice for the Court to hold, as does the Court of Appeals, that a landowner is entitled to nothing whatever for this gasoline taken from his land. It would be more reasonable to hold that the gas company, lessee, is not entitled to any part of the gasoline, and the landowner is entitled to all of it, because the landowner had not permitted the lessee to take it.

This issue has been before the Supreme Court of Louisiana twice recently.

In *Coyle v. Louisiana Gas & Fuel Co., 175 La. 990, 144 So. 737, 739,* that Court said:

> "We find nothing in the record to warrant the belief that the lease under review contemplated that defendant should be allowed to take the gasoline, a product of much greater value than the gas, from the leased premises, by merely paying him for one-eighth of the gas. If its gasoline content is not regarded as included in the

gas within the meaning of the contract, then, obviously, defendant is not entitled to it, or any part of it. If it is so regarded, then one-eighth of it is due plaintiff by virtue of the agreement." (Lease).

In *Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561*, the lease sued on was identical with the one in the case at bar, as to gas royalty, and the landowner made the claim that since the lease he had signed made no mention of gasoline, and he owned everything on his land except what he had sold, that the gas company was not entitled to any of it, that is, the landowner was entitled to *all* of the gasoline, instead of *none* as here held by the Court of Appeals. On this, the Supreme Court of Louisiana said (152 So. 565):

> "We find no merit in the contention that the lessees were entitled to none of the gasoline extracted from the natural gas. According to the expert testimony introduced in this case, practically all natural gas contains some gasoline which comes to the surface in the form of vapor. The presence of the gasoline in the natural gas, they say, is probably due to the fact that at some remote period, the gas came in contact with oil from which it took up some of the lighter fractions. Gasoline is therefore one of the constituent elements of 'natural gas' as that term is ordinarily used and understood. Act No. 252 of 1924 is an act to conserve the 'natural gas' resources of the state, and in section 13 thereof, it is stated that 'gas' means natural gas as it is taken from the earth, including any gasoline content it may have."
>
> "This court, in Coyle v. Gas & Fuel Co., supra, stated, in fact held, that 'the gasoline was part of the gas produced.' It has been so held by

the courts of Oklahoma and Texas. See Humble Oil & Refining Co. v. Poe (Tex. Com. App.) 29 S. W. (2d) 1019; Lone Star Gas Co. v. Stine et al. (Tex. Com. App.) 41 S. W. (2d) 48, 82 A. L. R. 1299.

"The lessee owned seven-eighths of the natural gas produced under the lease, which included all the constituent elements thereof, all that the gas contained."

Thus the jurisprudence of the Supreme Court of Louisiana is clear, and logical. That Court holds that when the parties to the lease at bar signed the lease stipulating royalty on natural gas, they intended to include and did include all the constituents of the gas, including the gasoline content; and when the lessee divides the gas as it comes from the well, into gasoline and "dry gas", and sells each separately, as in the case at bar, the landowner is entitled to his ⅛th of the market price of each, the gasoline and the dry gas, and the lessee to 7/8.

This is the only issue on which the Court of Appeals gave us an opinion. On this issue they wrote no opinion in the case at bar, but did refer to the case of *Union Producing Co. v. Pardue, 117 Fed. (2d) 225, 229*, in which they said:

"Here cross appellant in support of his claim relies on the statutory definition of natural gas, in Louisiana Act 252 of 1924, Section 13, (Dart Sec. 4783): 'Gas, means natural gas as it is taken from the earth, including any gasoline content it may have, but it does not include casing-head gas,' and on Coyle v. Louisiana, etc., Co., 175 La. 990, 144 So. 737, and Wall v. United Gas, etc., Co., 178 La. 908, 152 So. 561. We might dispose of the cross action by a mere reference to our

holding in the Arkansas Natural Gas Corp. v. Sartor, 5 Cir., 98 F. 2d 527, that the contract did not entitle plaintiffs to royalties based on the value of the gasoline extracted from the gas. But, in view of cross appellants' insistence that the matter is ruled otherwise in Louisiana, in the Coyle and Wall cases, we will point out that this is not so and why.

The statute cross appellant invokes makes against, not for, his position. It expressly declares that the term gas means natural gas as it is taken from the earth including any gasoline content it may have, and leaves no question but that the sale of gas carries to the purchaser all, not part of its content. Cf. the Coyle and Wall cases, supra, and Humble Oil & Refining Company v. Poe. Tex. Com. App., 29 S. W. 2d 1019; Lone Star Gas Co. v. Stine, Tex. Com. App., 41 S. W. 2d 48, 82 A. L. R. 1299; Wilkins v. Nelson, 155 La. 807, 99 So. 607. It is true that in the original opinion in the Coyle case (175 La. 990, 144 So. 739), the court said, 'We find nothing in the record to warrant the belief that the lease under review contemplated that defendant should be allowed to take the gasoline, a product of much greater value than the gas, from the leased premises by merely paying him for the eighth of the gas. If its gasoline content is not regarded as included in the gas within the meaning of the contract, then obviously defendant is not entitled to it, or any part of it. If it is so regarded, then one-eighth of it is due plaintiff by virtue of the agreement.

"Aside from the fact however that no issue was made of this point in the case, it being conceded that under the lease contract plaintiff was entitled to ⅛ of the gasoline and the suit being only with regard to whether plaintiff could get this ⅛ of the gasoline without paying any part

of the cost of its extraction, the conditions in the field involved and the terms of the lease were entirely different from those here. There, the gas was so rich in gasoline with one and a half to two gallons per 1,000 feet, that it was worthless unless the gas was first extracted. This was recognized by both parties, and the lessee from the beginning accounted to plaintiff for ⅛ of the gasoline. But more important the lease there was not as here, one in which the lessor sold the gas to lessee at the well. There was no provision in that lease for sale of the gas. There, the provision was that the lessee would 'pay the lessor one-eighth royalty for the gas from each well where gas only is found, while the same is being used off the premises." Under such a provision, it was the duty of the lessee, absent an agreement for its purchase, to deliver to the lessor in kind, gas, gasoline, or whatever was made from the gas issuing from the well, or to account to him for his ⅛ of the proceeds of all sales. Here, the title to the gas passes to lessee at the well, lessee being obligated to pay lessor the value of it there. In the opinion on rehearing in the Coyle case, the true issue in the case was made clear. The court saying: 'The true issue * * * is whether plaintiff, as lessor, is entitled to be paid his proportionate part of the net sale price, or of the gross sale price, of the gasoline extracted from the gas, due him as royalty, produced from gas wells on the lease,' held that as owner of the gasoline, lessor must pay his share of the expenses, and must be settled with on the net sale price after expenses paid. In Wall's case, the lease provided as the lease here does, that the grantor should be paid the ⅛ of the value of the gas calculated at the market price, but the conditions in the field as to the strong impregnation with gasoline were the same as those in the Coyle case, and as in that case, the

lessee from the beginning had recognized the right of the lessor to an interest in the gasoline. There the lessor contended not for ⅛ but for all of the gasoline and when the case reached the Supreme Court, two main questions and one secondary one were raised, posed and decided there. First, as to what was the meaning of the terms 'market prices' as used in the lease, second, whether the lessor under the lease providing for a ⅛ royalty interest 'is entitled to all the gasoline extracted from the gas or only ⅛ of it,' and third, the question decided in the Coyle case, whether plaintiffs were entitled to the gross value of ⅛ of the gasoline, or its net value after costs of extraction had been paid.

"Plaintiff, in this case, having in his primary pleading alleged that lessee was entitled to and had bought all of the gas which came from the well and as a result of that purchase was liable to him for the full value of ⅛ of it, the district judge was right is holding that he could not add to the claim for that full value, another claim for two cents per 1,000 feet more, because the purchaser of the gas had extracted gasoline from it."

We respectfully suggest that the Court of Appeals is clearly in error.

The Court of Appeals differentiates the *Coyle* case from the case at bar, on the grounds that the percentage of gasoline was higher in the *Coyle* case. This seems entirely irrelevant to the legal principle. If the landowner is entitled to ⅛th of the gasoline and ⅛th of the dry gas, when the percentage of gasoline is high, why is he not equally entitled to it when the percentage is low? The dictum that lessor sells the gas to the lessee at the well seems also immaterial, and incorrect, because that is not

what the lease says. Lessor sells to lessee, not gas, but the right to go on the land and take and own all of the gas. The Court of Appeals is therefore in error on the very fundamentals of an oil and gas lease (Tr. 22).

The Court differentiates the *Wall* case on the same ground, that the percentage of gasoline is high, which is incorrect, because there is no showing of excessive gasoline in the *Wall* case, and the percentage of gasoline stated in the opinion is almost exactly the same as in the gas produced from petitioner's well.

The reference in the last paragraph, to the pleadings in the *Pardue* case, has no reference to the case here at bar, because our petition or complaint in this case recites all the facts regarding the gasoline and gas, and prays for market price of each separately (Tr. 15-16).

Hence it seems clear that the Court of Appeals has not followed the jurisprudence clearly expressed by the Supreme Court of Louisiana, that petitioner is entitled to ⅛th royalty on gasoline. This will be a big amount.

2. MARKET PRICE CONTEMPLATED BY THE LEASE WAS PRICE IN FIELD

In construing a contract of lease stipulating that the royalty shall be ⅛th of the market price of gas produced, the first question is, what market was contemplated by the parties. If the gas were sold at the well where produced, it might be held that the market price of such sales was what was contemplated. But no such sales were had in the case at bar. In the absence of such sales, it seems obvious that what the parties contemplated was the market

price of sales in the gas field where the gas field was produced.

In the case at bar, the Richland gas field is a definite, clearly defined tract of land, about 9 miles long by six miles wide, thickly studded with wells, with the points of sale of gas scattered thruout the field. Obviously there can be only one market price for gas in this little area, because the sales are scattered all over the area, and it would be no more possible to have two different market prices for gas in that field, than to have two different market prices for wheat in the City of Chicago.

The Supreme Court of Louisiana has expressly recognized this in two cases, when the Court had before it leases, with the same royalty clause on gas as in the lease now at bar.

In *Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561, 563*, that Court said:

> "In the lease contract here involved, the lessee was required to pay to the lessor one-eighth of the value of the gas sold off the premises, calculated at the 'market price' thereof. The price to be paid was left open or made to depend upon the 'market price' at the time the gas was produced . . . There is nothing in the contract itself nor in the testimony to show the intent of the parties touching the question whether the term 'market price' meant the price at the well, or the price the gas would bring in a market remote from the well. We think it reasonable to assume that *the parties intended that, if there was a market for gas in the field, the current market price there should be paid.*" (Italics ours).

In *Sartor v. United Carbon Co., 183 La. 287, 163 So. 103*, the lease involved was the same as in the case at bar, except it stipulated for market price "at the well", and that Court said:

> "This Court in the case of Wall v. United Gas Public Service Co., 178 La. 908, 152 So. 561, held that the language in the lease which required the royalty to be paid on the basis of the market price at well, was synonymous with the market price at the field where the gas was produced."

Hence we respectfully submit that the opinion of the Court of Appeals seems erroneous in stating that we have not pointed out any good reason why that Court should "plump" with petitioner for a new measure, market price in the field, and the Court of Appeals has expressly failed to follow the jurisprudence of the Supreme Court of the State of Louisiana, in not holding that the market contemplated by the parties to this lease was the market in the field where the gas is produced.

3. DENIAL OF APPEAL

If the District Court had refused to grant petitioner any appeal from its judgment, that undoubtedly would be denial of due process of law, because Congress has seen fit to grant such appeal.

We respectfully suggest that the refusal of the Court of Appeals to consider and decide the issues laid before the Court by petitioner on the appeal, is even more a denial of due process of law and a departure from the customary judicial procedure. Petitioner spent much time and money perfecting appeal, and confidently relied on it to correct the errors of the trial court. It would be much more merciful to deny appeal altogether than to permit an

appeal where the appellate court does not carefully consider the issues laid before it.

That the Court of Appeals did fail to consider and decide the issues laid before them by petitioner as appellant, is apparent from what has been previously said. To make this clear, we annex to this brief, a copy of our original brief in the Court of Appeals. Our brief in that Court on rehearing is already in this record.

Our 1st and strongest claim was that the District Court erred in admitting in evidence 865 oil and gas leases in which the royalty was 3c instead of "market price". This was clearly error because these leases were not sales of gas, but were sales for a valuable consideration paid at the time, of the right to go on land and drill (Tr. 22), and usually no gas was ever produced. The Court of Appeals mentions this assignment of error, but does not consider or decide it.

Next we urged that no deductions should be made from the pipe line prices. The Court of Appeals does not notice this.

Next we objected to having the opinions of high ranking gas company officials, that the correct market price was 3c, hurled at the jury. The Court of Appeals does not notice this contention.

Next we objected to certain technicalities of evidence. The Court of Appeals did not notice this.

The opinion of the Court of Appeals does refer to other decisions by that Court. It specially refers to two decisions rendered the same day as the case at bar:

Union Producing Co. v. Pardue, 117 F. 2d. 225;
Union Producing Co. v. Driskell, 117 F. 2d. 229.

which, as we have shown, do not touch on the issues in this case, except gasoline, for the simple reason that in those cases the jury decided in favor of the landowner.

In two preceding cases, the Court of Appeals had considered these issues. In *Arkansas Nat. Gas Co. v. Sartor, 78 F. 2d 929*, the Court ruled that the written contracts of sale cannot be introduced in evidence, because they are sales of large quantities of gas and lessors would not have been able to sell large quantities. We have never understood this reason, as written contracts of sale seem the best evidence of the price.

In *Sartor v. United Gas P. S. Co., 84 F 2d 436, 438*, the Court of Appeals said:

> "While, then, we agree with the District Judge in the view he took in the Arkansas Natural Gas case and in this, that plaintiffs were entitled to receive for the gas the market price at the well, and not the market price in the field, we agree with plaintiffs that they were not bound, in determining that market price, or if there was no market price the fair value at the well, by what defendant chose to pay them and others, Wall vs. United Gas, 152 So. 561, but were entitled to inquire into what defendant sold gas for at the well, if it sold any there. If none was sold at the well, and if there was no actual market price established day by day in the field, they were entitled, in proving the value at the well, to prove what defendant got for it day by day in the field. In doing this they and the defendant were entitled to have taken into consideration under careful instructions to the jury,

all the elements which entered into the price in the field, so as to carefully limit the value or price to be paid plaintiffs so that part of the price the gas sold for in the field, which after proper deductions, represented the price at the well. On another trial the jury should therefore be carefully instructed, among other things that the prices the producer is obtaining for gas under his pipeline contracts are not true daily market prices. They are prices paid under long term contracts, entered into years before, and therefore having a bearing on the issue to be tried not as representing fixed daily market prices, but merely as aiding in arriving at a conclusion as to the fair value at the well, from day to day, of the gas taken from plaintiffs' well.

In determining market price or value a mere matter of opinion in a case like this, fixed and rigid rules do not govern. The object and purpose of the inquiry in this case is to determine, (1) if it can be done, the daily market price at the well, or at the nearest market, less costs of getting it there. (2) If there is no daily market price, the object is to determine what the gas is actually worth at the well. In determining this every factor throwing any light upon it may and should be considered. The factors of remoteness or of differences in circumstances attending the prices selected for comparison should be controlled by guiding, rather than by exclusionary ruling. These are the basic rights of the parties under the lease. Plaintiffs should have and defendant should pay them ⅛ of the gas taken the market value at the well, if there was one, the actual value there, if there was not. In determining this every factor properly bearing upon its establishment should be taken into consideration. Included in these are the fixed royalties obtaining in leases in the field, considered in the light of their respective dates, the

prices paid under the pipeline contracts, the conditions existing when they were made, and any changes of conditions. The end and aim in view being to ascertain upon a fair consideration of all relevant factors, the fair value at the well of the gas produced and sold by the defendant."

The requirement of the above decision, that any landowner seeking to recover the market price of gas must show daily market price, was so contrary to the possible proof, that in the case at bar we introduced new evidence, not before the Court of Appeals in the above decision but before that Court in this case, namely, the testimony of the President of the American Gas Association, Mr. N. C. McGowen (Tr. 60-62).

He testifies that the market for natural gas must be pipe lines, because gas cannot be transported from the field where produced to the place where used, by railroad cars or trucks, as in the case of oil, but can be carried only in pipe lines. Pipe lines are expensive. Before a pipe line is built, the builders must have contracts for a reliable supply of gas continuously for a sufficiently long period to amortize the cost of the pipe line.

Hence Mr. McGowen testifies the market for gas cannot be a daily market, but is a long-term market, that is, the sales are at prices fixed by contract in advance. He testifies that the parties to this lease must have contemplated such a market when they made this lease stipulating that royalty should be "market price."

Altho this highest expert thus testified that the Court of Appeals in the foregoing decision had set an impossible standard of proof, which completely misunderstood the nature of gas and its markets, and altho we strongly called

this to the attention of the Court, yet the Court completely ignores and does not even mention this testimony, or modify its ruling.

4. GENERAL IMPORTANCE OF THIS CASE

The general importance of the issues here presented is shown by the fact that all or part of these issues have been before the Courts recently in the following cases:

U. S. 5th Circuit Court of Appeals:

Arkansas Nat. Gas. Co. v. Sartor, 78 F. 2d. 924;
Roberts v. United Carbon Co., 78 F. 2d. 39;
United Gas Co. v. Pardue, 78 F. 2d. 929;
Brown v. United Gas P. S. Co., 96 F. 2d. 264;
Thomason v. United Gas P. S. Co., 98 F. 2d. 526;
Sartor v. United Gas P. S. Co., 84 F. 2d. 436;
Arkansas Nat. Gas Co. v. Sartor, 98 F. 2d. 527;
Union Producing Co. v. Driskell, 117 F. 2d. 229;
Union Producing Co. v. Pardue, 117 F. 2d. 225.

Supreme Court of Louisiana:

Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561;
Coyle v. Louisiana Gas & Fuel Co., 175 La. 990, 144 So. 737;
Sartor v. United Gas P. S. Co., 186 La. 555, 173 So. 103;
Sartor v. United Carbon Co., 183 La. 287, 163 So. 103;
State ex. rel. Boykin v. Hope Producing Co., 167 So. 506.

In each of these cases, and in countless other cases, the situation is that a landowner, usually a small farmer, entirely unacquainted with the gas business, is endeavor-

ing to obtain from a large oil or gas company, his rightful share of the price of natural gas, including increases.

In each case, the oil or gas company was settling with the landowners, who knew nothing about the price of gas, by sending them statements showing the market price of gas to be far less than the price at which gas was being actually sold in the fields where produced, sometimes only little more than half the actual sales. These sales had been kept hidden from the landowners.

When the price being received by the gas companies was made generally known, as being far more than the landowners were receiving in their settlements, the able and resourceful attorneys for the gas companies adopted the well-known principle of practical law: "When the facts and the law are against you, confuse the issues".

In this case, and in other cases, the attorneys for the gas companies have done a masterly job of confusing the issues. Some of their methods of confusing the issues are hereinabove stated. The game is to make the evidence required for proving "market price" so complicated, uncertain and technical that no land-owner can make the required proof, and the gas companies can pay them anything they please.

We ask this Court to note the requirements for proof of market price called for in the opinion of the Court of Appeals in *Sartor v. United Gas P. S. Co., 84 Fed. 2d 436, 438*, just above quoted in this brief. This is the final jurisprudence unless your Honors intervene, because the Court of Appeals has ignored our requests in this case for a modification.

In this opinion, the Court says landowners must prove the "value" of the gas. The lease contract says that landowners shall receive the "price" of the gas. Price is a fixed amount, easily proven, by simply showing the sales. Value is a hazy, inexact concept almost impossible to prove. It does not seem right that landowners should be compelled to prove the value of gas, when their contract calls for its price.

Next the Court says the landowner must show the daily market value. We have shown in the case at bar that there is no such daily market price or value, from the nature of the gas. So landowners are required to prove an impossibility.

Then the Court says landowners must prove every factor entering into the value. This makes the whole proof so hazy and uncertain that no landowner can hope to compete with an expert oil and gas company in the courts with such proof required.

If your Honors will take up this case, we believe a rule will be laid down that the market price of natural gas is to be proved by taking a fair average of the sales in the field where it is produced. If this rule is laid down, the thousands and hundreds of thousands of landowners who hold leases reading substantially like the lease at bar, will be able to secure their rights and the increased royalty due them as the price of natural gas advances, simply and easily, because the price at which gas is sold can always be surely proven.

If your Honors do not take up this case, the above quoted decision of the Court of Appeals becomes the final jurisprudence, and it will be practically impossible for a

landowner to obtain his rightful share of the gas produced, in contest with the big, powerful and highly expert and experienced gas companies.

Respectfully submitted,

G. P. BULLIS,
Attorney for Petitioner.

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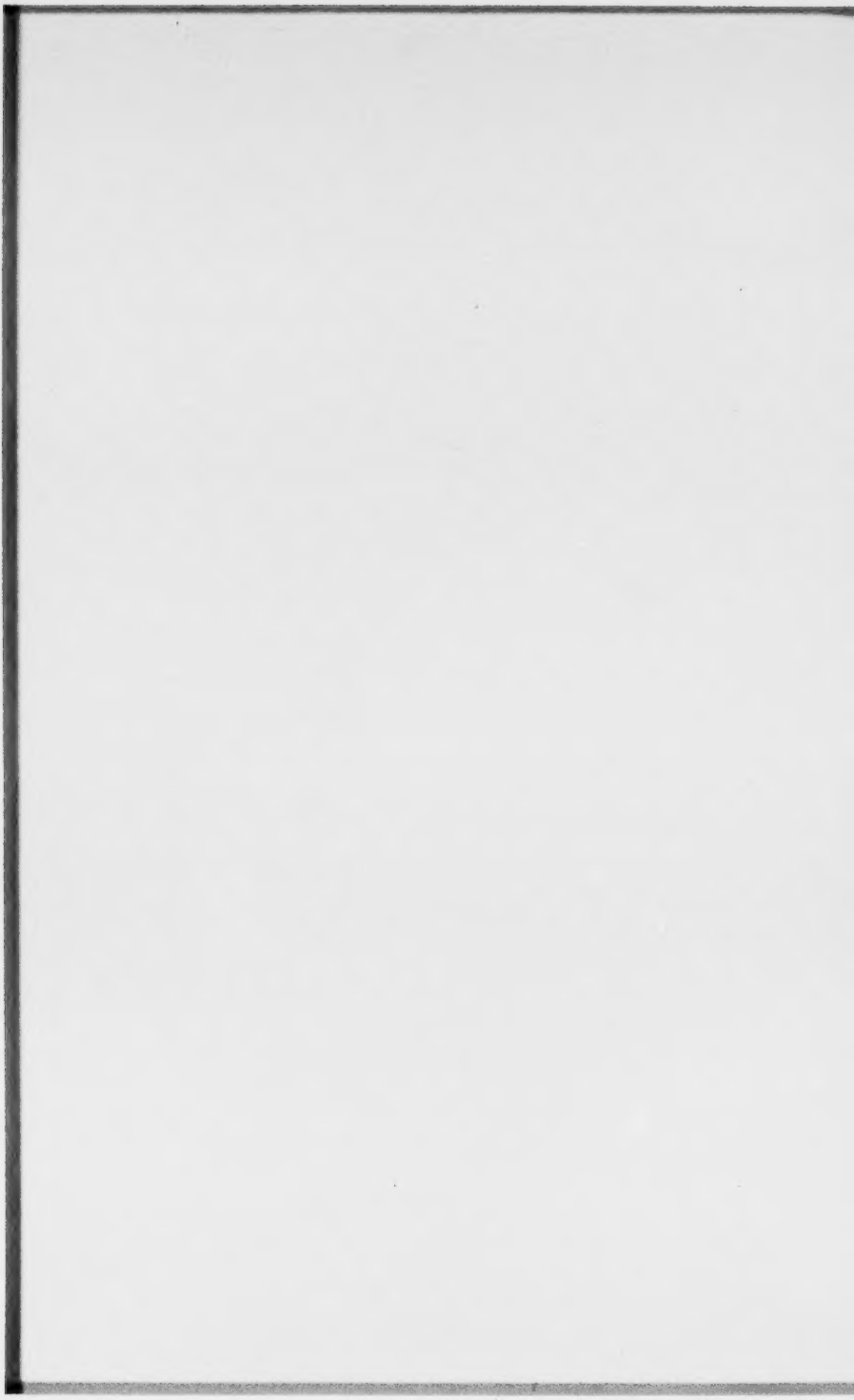
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No. 9504

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT

J. H. HEMLER,
Plaintiff, and Appellant,

versus

HOPE PRODUCING CO.,
Defendant and Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

ORIGINAL BRIEF OF J. H. HEMLER, APPELLANT.

STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

Appellant is lessor in an oil and gas lease, under which appellee, as lessee, produced much gas. Appellant here claims additional royalty on the gas produced.

This is one of several suits having the same issues, filed by land-owners in the Richland gas field, three of which suits are now before this Court.

The lease sued on stipulates that appellant, as lessor, shall receive one-eighth of the market price of the gas produced. Under this, appellee paid appellant royalty on the basis of 3c per thousand cubic feet. For brevity we will hereinafter abbreviate "thousand cubic feet" to "MCF".

In this suit, appellant claims that the market price was much more than 3c, and sues for the excess.

On the trial of this case, plaintiff proved that defendant was a large producer of gas in the Richland gas field, and sold all its gas at delivery points within the field, for 4c to 6c per MCF; that its average sale price was 4.832c per MCF; that all the other large producers sold for the same price, the sales being to pipe lines within the field; and that the market for natural gas is and always must be long term contracts with pipe lines, as gas cannot be marketed any other way.

Appellant also claimed in his petition that appellee had extracted and sold much gasoline from the gas produced, and appellant claimed $4626.56 for ⅛ royalty on this gasoline. However, the District Court struck out this claim from appellant's petition, in limine.

Appellee, in the trial, introduced in evidence several contracts, which we think inadmissible, to show sales of a small quantity of gas, a little at the wells, for less than the above figures; and testimony purporting to show that appellee incurred some expenses in carrying out its contracts for sale of gas to pipe lines shown in appellant's evidence. Appellee then introduced in evidence a bulky document consisting of extracts from over 900 oil and gas leases, widely scattered in time and location, wherein lessor agreed that his royalty would be paid as ⅛ of 3c per MCF produced.

Appellee also introduced in evidence, the opinion of several witnesses that 3c was the correct market price; and a statement purporting to show the cost of transportation of gas from the wells to the pipe line delivery points, consisting of extracts from its books, plus various opinions, and guesses by its book-keeper, there being no accurate figures in appellee's books as to what this cost of transportation was. Appellant objected to all of the above evidence, and pleads it as reversible error, as will be hereinafter shown.

Appellant also objects to much of the District Judge's charge to the jury, as will be hereinafter shown, especially that part of the charge which instructed the jury that if they found sales of gas at any of the wells in the field, they should disregard the pipe line prices covering 94% of the total gas produced, which appellant had proved, and use only the sales at well to determine the market price due to appellant.

The jury brought in verdict for defendant on the merits. Hence the various pleas of estoppel, accord, etc., filed by defendant are not now at issue, and may be disregarded here.

SPECIFICATION OF ERRORS

1. The District Court erred in failing to hold that the market price of gas, to which appellant is entitled under the lease sued on, is the price in actual sales of gas within the Richland gas field.

2. The District Court erred in admitting in evidence to prove the market price to which appellant is entitled, any evidence except the price in actual sales of gas within the

Richland gas field, especially leases and the opinion of witnesses.

3. The District Court erred in admitting in evidence contracts for sale of gas contrary to the rulings of this Court.

4. The District Court erred in permitting cross-examination of appellant's witness, N. C. McGowen, on subjects not mentioned in the direct examination.

5. The District Court erred in permitting oral testimony of the contents of written contracts, especially as the contracts themselves had been ruled inadmissible by this Court.

6. The District Court erred in permitting evidence of the operating expenses of appellee, since the costs of operation are irrelevant to the market price of sales.

7. The District Court erred in holding that under the lease contract sued on, appellee was not required to bear all the expense of producing and marketing the gas, as consideration for the 7/8 of the product of the wells granted to appellee as lessee in the lease.

8. The District Court erred in failing to hold that under the lease sued on, stipulating that the royalty is ⅛ of the market price, the market contemplated by the parties was the market price of sales in the field.

9. The District Court erred in failing to hold that any ambiguity or uncertainty in the lease is to be construed strongly in favor of appellant as lessor.

10. The District Court erred in holding that there was one market price at the well, and another, larger, market price at other points in the Richland gas field, the fact being that there was only one market price for gas within the Richland field.

11. The District Court erred in holding that appellee was entitled to deduct from the market price in the field, the cost of transporting gas from the well to the delivery point within the field.

12. The District Court erred in permitting defendant to introduce in evidence its exhibit marked "D-26", or any evidence regarding it, because the evidence showed this statement to be false and untrue, and not a copy of any books or records, but merely a guess by appellee's bookkeeper who was not familiar with the practical operations in the field.

13. The District Court erred in permitting evidence of the cost of appellee's field operations by an employee not familiar with or expert in such operations.

14. The District Court erred in admitting in evidence, bulletins of the United States Department of Commerce, showing general prices covering all of Louisiana.

15. The District Court erred in striking from appellant's petition, all claims for royalty on gasoline produced from the well sued on, and denying to appellant any royalty on such gasoline.

16. The District Court erred in its charge to the jury, as follows:

(a). In charging the jury that they were not to take into consideration, in deciding this case, any of the sales to pipe-lines which constitute 94% of the total gas produced, unless they first found that there were no sales at the well, because the Court should have charged that the jury must take into consideration all sales of gas for delivery within the Richland gas field.

(b). In charging the jury that appellee is entitled to deduct from the prices received from its pipe line sales, the expense of getting the gas from the wells to the delivery points to the pipe lines within the Richland gas field, this being error because this is part of the expense to be borne by appellee, as lessee, in consideration of receiving 7/8 of the gas produced, and for the further reason that this cost being peculiarly within the knowledge of appellee, it was obliged to prove with reasonable certainty what this cost was, which appellee failed to do.

(c). In failing to give appellant's requested special charges No. 2, 3, 4, 5 and 7, and in giving appellee's requested charges No. 5 and 6.

17. The District Court erred in failing to hold that this being a suit to enforce a written contract of lease, the Court will ascertain and enforce the agreement contemplated by the parties.

18. The District Court erred in failing to hold that the market price contemplated by the parties to the lease sued on, was the price received by lessee and other producers, in any and all sales made in the field, with no deductions.

ARGUMENT

Your Honors will note that this case presents identically the same facts and issues as cases Nos. 9493 and 9499, submitted at the same time.

In each of these cases, the same narrow issue is presented, namely, what is the market price of natural gas in the Richland gas field, in Richland Parish, State of Louisiana.

Obviously, the market price of gas, or anything else, is what it sells for. There can be no price without a sale. There might be situations where there were no genuine sales from which market price could be determined; but in the case at bar, very many sales, of all the gas in the field, each admitted to be genuine, are in evidence. Hence it seems self-evident that all there is to determining the market price of gas, the issue in this and other cases, is to submit to the jury the various sales, and let the jury decide what is a fair average of the prices.

Yet on this simple issue, so simply and easily decided, the District Court and this Court have spent almost ten years of active litigation, without deciding the issue. Surely there must be something wrong with the procedure, when so protracted litigation is required for such a simple issue.

The key to the prolongation of this litigation is to be found in the old adage, well known as a practical guide to lawyers for winning lawsuits:

"If the facts and the law are against you, confuse the issues and muddy the waters."

In this case, as well as in the other similar cases, the very able and resourceful attorneys for the gas companies, were confronted with the inescapable fact that almost all of the sales of gas were at a price almost twice what the gas companies had paid to their lessors, hence simply laying the facts before the jury would result in a big verdict for plaintiffs. To avoid such a deplorable result, they have done a masterly job of confusing the issues and "muddying the waters."

The methods used by them for confusing the issues fall into five classes:

1st. Introduce in evidence an immense mass of leases, in which other land-owners, anywhere, at any time, leased their lands for oil and gas development, in leases stipulating that if oil and gas were found, the royalty would be ⅛ of 3c per MCF. No explanation has ever been made, in this or any other case, of what relevancy such leases have to the issue of market price of gas actually produced and sold.

2nd. Introduce in evidence testimony of gas company officials that there is some cost to producing gas to sell to the pipe lines. No explanation is ever made of why, when sales have actually been made at fixed prices, the fact that the price of the sale is not 100% profit, has any bearing on the issue.

3rd. Have the gas company officials and their satellites give a solemn opinion that 3c is the market price of gas. No explanation is ever made of why a defendant should be allowed to testify its opinion as to what the jury should decide.

4th. Strongly assert that there are two market prices, one at the wells in the field, the other, much higher, "in the field," carefully avoiding any explanation of how it is possible, when a gas field consists only of an area thickly studded with wells, that there be one market price at the wells and another market price, nearly double, in the field within a hundred feet of the wells.

5th. File in evidence and testify at length to a complicated, confused conglomeration of figures which no one can explain or understand, purporting to show the cost of transporting gas from the well to the delivery point of the pipe lines, within the field.

In the case at bar, the District Court permitted appellee to confuse the issues by all these means. We contend that by this confusion, and the erroneous charge to the jury, the District Court so confused the jury that it could not bring in a correct verdict. This we will endeavor to show in detail.

Our brief will discuss in order the following points:

1. Market Price can be proved only by sales.

2. The intent of the parties to the lease sued on was that the sales in the field should determine the royalty to be paid.

3. The sales in the field show that appellee is entitled to almost 5c per MCF as royalty.

4. Leases were erroneously admitted in evidence.

5. Opinions were erroneously admitted in evidence.

6. Operating costs of producers were erroneously admitted in evidence.

7. There is only one market price, that for the field, and appellant is entitled to that price.

8. Appellee's purported statement of costs of operating pipe lines was erroneously admitted in evidence.

9. Appellant's claim for royalty on gasoline was erroneously stricken.

1.

Market Price Can Be Proved Only By Sales.

The lease sued on stipulates that appellant shall receive as royalty, 1/8 of the market price of the gas produced (Tr. 23).

The Supreme Court of the United States defined "Market Price" in the case of *Muser v. Magone, 155 U. S. 240, 249*, as follows:

> "such price as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade."

Your Honors considered this question in the case of *Sartor v. United Gas P. S. Co., 84 F. (2d) 436, 440*, and there agreed with us that sales must be used to determine price, but in that case took the position that plaintiff must prove a day-to-day price, a daily posting of prices.

In that holding, your Honors evidently took it for granted that the market for gas is of the same nature as

the market for oil. In that case, plaintiff failed to show anything to the contrary.

In this case now at bar, plaintiff has met this ruling in the previous case, by offering in evidence complete new proof of what the market for natural gas actually is.

To prove this, we were forced to call as our witness, Mr. N. C. McGowen, who was a hostile witness because his company is defendant in a similar suit, No. 9493 now before this Court. We ask the Court to read his very illuminating testimony, condensed at Transcript pages 60-62 (Tr. 60-62). His testimony is:

1. The market for natural gas is entirely different from the market for oil, because oil can be stored above ground, but gas cannot be so stored; and oil can be, and frequently is, transported from the well to the market by railroad cars or automobile trucks, but gas can be transported from the field where produced, to the market where used, by pipe lines.

2. Pipe lines are costly.

3. No one will build a pipe line to market gas, unless he has, in advance of construction, contracts with sufficient producers to insure a supply of gas, to be delivered over a long term of years, sufficient to repay the cost of the pipe and a profit.

4. Hence there cannot ever be for gas a day-to-day, changing market, or posted prices, as in the case of oil, but the only possible market for gas is a long term market, that is, a market in which gas is sold by contract to deliver over a long period of years at a fixed price. That fixed price in

the long term contracts is the market price and the only market price.

This testimony shows that your Honors were correct in the rulings in the previous case except on one point. Where your Honors require proof of a day-to-day market, that is the correct market for oil but not for gas.

2.

Intentions of the Parties to the Lease.

This being a suit on contract, the object of the Court is to ascertain and enforce the intent of the parties.

It seems self-evident that lessor contemplated, in signing this lease, that the market price he would receive, would be the price of whatever sales were made, by his lessee, or possibly by all producers, in the field.

However, on this point we have clear and undisputable evidence. Mr. McGowen testified as an expert (Tr. 61), that any reasonable man would contemplate that the market for natural gas would be a market in which the supply and price were fixed by contract over a period of years, and not from day to day, and on page 62, testifies:

> "The physical characteristics of the gas business demand that any reasonable man making any kind of a contract regarding a market for gas in the Richland gas field in or about the year 1926, would not seriously contemplate a market where he had to sell his gas from day to day to Tom, Dick and Harry, but would contemplate a market at a fixed price with maximum and minimum deliveries over a fixed period of time. A

characteristic of the gas business is that it must be conducted in that manner, and not on a posted daily price such as is done in the oil business. The situation in the gas business is different from that which obtains in the oil business. It isn't a varying market."

Thus we have proved by clear, undisputed, and eminently reasonable and understandable evidence, that the market price of gas contemplated by the parties to this lease was simply and entirely, the sales to the pipe lines, modified slightly by the small sales for carbon black.

We respectfully suggest that this case should be remanded to the trial court to lay before a jury exactly this evidence, without any irrelevant confusion.

We ask the Court to note that this makes a simple, easily operated rule, and one which eliminates all this uncertainty and confusion of purpose which has kept this issue in Court for ten years.

3.

Proof of Sales.

Your Honors ruled in the case of *Sartor v. Arkansas Natural Gas Co., 78 F. (2d) 924*, that the contracts of sale of gas could not be put in evidence. This was reiterated by this Court in the case of *Sartor v. United Gas P. S. Co., 84 F. (2d) 436, 438*, in which last case, plaintiffs attempted a second time to introduce these contracts in evidence, which the District Court refused because of the first above case, plaintiff took Bill of Exceptions No. 22 to this ruling, and your Honors rejected this bill, holding that the District Court rightly refused to introduce these con' cts in evidence. *84 F (2d) 439.*

It being the settled jurisprudence of this Court that these contracts are inadmissible, appellant in the case at bar proved their prices by showing the exact sales made by appellee of all its gas sold within the Richland field during the period involved in this case (Tr. 204-208). This shows the sales made by appellee were from 4c to 6c per MCF, excluding a sale to a subsidia Interstate Natural Gas Co. Even with this "Wash" sale, the average price received by appellee was 4.832c per MCF (Tr. 72). We then showed (Tr. 62) that all the other producers sold to the pipe lines at the same price. We then showed (Tr. 197-198) that these producers were about 94% of the producers in the field, and that all the other sales combined were only 6.3% of the total production (Tr. 211).

Thus we showed that the sales which were contemplated by appellant as the market price he was to receive, were at least 4.832c per MCF instead of the 3c appellant received.

In its turn, appellee attempted to prove the prices in these little 6.3% of the total.

These sales were:

1. A sale by Alto Gas Co. to United Gas P. S. Co., (Tr. 258), which was for 3c because the Alto Gas Co. could not sell direct to the pipe lines, because they had contracted to buy only from the big producers, and so Alto Gas Co. had to sell to a big producer and let it resell to the pipe line at a big profit (Tr. 70).

2. A trivial sale from a big producer to D. H. Goodwin, evidently to give some local people gas for local use in trivial amount (Tr. 283).

3. Two sales to carbon black plant which have so many diverse provisions, such as basing the price on future sales of carbon black, and giving the seller an interest in the plant of the buyer, that they are worthless as showing any price.

However, the vital point is that in each of the above cases, the District Court squarely defied your Honors rulings as above stated, and permitted the long, complicated, unintelligible contracts of sales themselves to be introduced in evidence, over appellant's strenuous objection (Tr. 82).

Thus the result is that these contracts showing a few trivial sales at a low price, were put into the record and offered to the jury in full, while the big contracts were not put before the jury. This was a gross discrimination against appellant, caused solely by the failure of the trial judge to compel appellee to observe your Honors ruling, as appellant did. This was reversible error, highly prejudicial to appellant.

4.

Leases erroneously admitted in Evidence.

In this brief we will now discuss each of the four means shown hereinabove by which appellee confused a simple issue of fact.

What hurt appellant more than anything, before the jury, was the immense mass of leases introduced in evidence by appellee as its exhibit 25 (Tr. 71). This is so bulky that by consent of counsel (Tr. 312) it is brought up and submitted to the Court in triplicate original. Three copies of this document, bulky enough so it will not be over-

looked, will be submitted to your Honors on the oral argument of this case.

By no stretch of the imagination can these leases be held to be pertinent to the issues in this case. The sole issue in this case is, what is the market price of gas. This can be proved only by sales. These leases are not sales of gas. The record shows many leases (Tr. 290-297). As every one knows, these are contracts by which a landowner, for a consideration, usually large, grants to an oil or gas producer the right to go on his land and drill for oil. This is the essense of the contract, a servitude of right to drill. As a minor, incidental clause, the lease stipulates that if lessee does drill and does find oil or gas, the lessor will receive a certain fixed royalty. This is certainly not a sale of oil or gas. In most leases, no oil or gas is ever found, and there is no evidence in the record that any oil or gas was ever found under any of these leases in the record. We challenge appellee to state any reason why these leases are pertinent.

To make it even worse, the period of time involved in this suit is 1930 to 1934, but most of these leases are dated about 1926, and almost all of them are dated long prior to the period of time involved in this suit. Also, by far the greater number of them, more than 75% of them, are not in the Richland gas field at all.

The use made by the able and forceful attorney for appellee of this prodigious weapon, was terrific. The District Judge charged the jury (Tr. 355) that if there was a market at the well, the jury must disregard the pipe line contracts. Counsel for appellee stood before the jury with this document (D-25) and turned the pages, ran his finger down the lines, and dramatically told the jury, "here are sales at 3c, 900 of them. You need pay no attention to the

pipe line sales, because these are sales at the well at 3c and the Judge says you must take these." Since the District Judge has permitted this in evidence, naturally the jury accepted this as correct. What a gross injustice to appellant.

To make it even stronger, the District Judge expressly charged the jury (Tr. 356) that they must take these leases into consideration in deciding whether or not there was a market at the well. It is difficult to see how a greater reversible error could be committed by a trial court.

Nowhere in this case or any other has any Court or lawyer made any explanation or statement as to why leases such as these are relevant to the issue of market price. We unhesitatingly say that no relevancy could be shown. We challenge opposing counsel to explain how these leases are relevant.

5.

Opinions.

The District Court, over appellant's objection, permitted appellee's witnesses McGowen (Tr. 68), Florsheim (Tr. 84), and McHenry (Tr. 85), and government bulletins (Tr. 87), to express opinion as to what was the market price of gas in the Richland field, all adverse to appellant. This was clearly error, as invading the province of the jury.

In *Bishop v. Wright, 221 Fed. 392, 394*, the Court said:

> "It is an elementary rule that when the Court or jury can make their own deductions, they should not be made by those testifying. In all cases, therefore, where it is possible to inform

> the jury fully enough to enable them to dispense with the opinions or deductions of witnesses from things noticed by themselves, or described by others, such opinions and deductions shall not be received."

We also cite the 22 pages of citation of authority in *22 Corpus Juris 485 to 506*, to the effect that opinions are not admissible when the facts are before the jury.

Undoubtedly it was highly prejudicial to appellant to have all these witnesses express an opinion that 3c was the correct price.

6.

Operating Costs of Producers.

Despite the fact that your Honors have most emphatically ruled twice that the contracts by which gas was sold by the producers to the pipe lines are not admissible in evidence, the District Court permitted Mr. McGowen to testify, orally, to the details of these contracts, over appellant's strenuous objections, and to swear that certain details of these contracts cost the producers to fulfill. His testimony is shown twice in the transcript, once, condensed by appellant (Tr. 63-68) then, ignoring appellant's condensation, appellee ordered the verbatim record of the same testimony to be inserted in the record (Tr. 89-124). This is a clear example of the way appellee confuses and encumbers this record.

The admission of this testimony is reversible error for three reasons:

(a) Mr. McGowen was appellant's witness, although hostile to appellant, and the cross-examination went beyond the direct.

(b) The testimony was oral testimony as to the contents of written documents not in the record and forbidden by this Court to go into the record.

(c) What it cost appellee to do business was irrelevant and immaterial, since appellant was not appellee's partner and had no interest in appellee's profit, losses, or expenses.

A.

Appellant put Mr. McGowen on the witness stand solely to show what was the market for gas. Appellant did not directly or indirectly ask him about prices or costs. Hence this examination went far beyond the direct, which is error. *Houghton v. Jones, 1 Wall. 702, 706.*

B.

It is difficult to imagine a more glaring disregard of the most elementary rule of evidence, than is here presented. Appellee was permitted by the District Court to ask this witness certain details of written contracts, of course picking out such details of the contracts as appellee thought helpful to its case and ignoring the other details, and the witness was allowed to testify what the contracts stipulated on these points. We cannot see how this can possibly fail to be reversible error. *Sebree v. Dorr, 9 Wheat. 558, 563.* The damage to appellant of having this testimony submitted to the jury as proper for them to consider, is obvious. Mr. McGowen squarely testified (Tr. 68 & 120), that the difference between the 3c paid to appellant and

the 4.832c which was the market price of the same gas, was the cost to the producer of the obligations in these written contracts about which he testified.

Proving the necessity for this rule that when written documents are available, oral testimony of their contents is inadmissible, Mr. McGowen's testimony of the contents of these documents is vitally incorrect. He says these contracts obligated the seller to maintain certain pressure. This is not true. He says these contracts required the seller to go out and buy more gas if their supply was insufficient. This is not true. How can it fail to be reversible error for the trial court to permit such a gross perversion of the elementary rules of evidence, when thereby untrue statements as to the vital contents of documents are put before the jury.

C.

What it cost the seller to do business under these pipe line contracts is irrelevant and immaterial. The sole issue in this case is what is the price in these sales. Presumably the seller named a price that would yield a profit, but whether this was true or not is immaterial.

Let us suppose an example. Suppose the issue before the Court was the retail market price of sugar in New Orleans. Suppose the undisputed evidence was that in all of the retail stores in New Orleans, sugar was sold for 5c per pound. Would there be any question but that 5c was the retail market price of sugar? Suppose a litigant tried to introduce additional evidence, to prove that it cost the stores considerable money to keep their stocks of sugar on hand and adequate, and to run their stores. Would anyone think this evidence disproved the previous evidence that 5c

was the price of sales. Obviously the court would rule that what it cost the retail stores to do business was not relevant, when the price at which they sold was in evidence.

So here, whether appellee had to incur expenses as testified by Mr. McGowen, is irrelevant. The relevant fact is that they sold at a certain price.

7.

A Gas Field Has Only One Market Price.

Possibly the most ingenious of opposing counsel's devices for confusing the record is the claim that there are two market prices, one at the wells in the gas field, and one in the field itself, and the land-owner is entitled only to the price at the well.

A mere glance at what a gas field really is, will dispell any such illusion.

A gas field consists of a limited area of land, thickly studded with wells. It is no more possible for there to be two market prices of gas in that limited area, than it would be for there to be two market prices for cotton in the City of New Orleans. The market price at each well must be the same as at every other well, and the market price at the well must be the same as in the field right next to the well. Assume for the sake of argument that wells are half a mile apart. There could not be a market price in that half mile different from that at the wells.

By oversight, no map of the Richland gas field was introduced in evidence in this case, but one will be found in the transcript of record now before the court in the case of *Union Producing Co. v. Driskell, No. 9499*, at page 378 of that transcript.

Looking at the matter also from the viewpoint of what was the intent of the parties to this lease: plainly lessor must have contemplated that any gas produced by his lessee or other producers would be sold in the field, and that he would receive 1/8 of such sales. It is unthinkable that lessor contemplated that some vague, indefinite sum would be deducted from than price by lessee for alleged transportation costs.

If any uncertainty existed on that point, it must be decided in favor of lessor, as an oil or gas lease is constructed strongly in favor of the lessor. *Rives v. Gulf Refining Co., 133 La. 178, 62 So. 623.*

Also, this issue has been squarely decided by the Supreme Court of Louisiana. In *Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561, 563*, that Court said:

> "There is nothing in the contract itself nor in the testimony to show the intent of the parties touching the question whether the term "market price" meant the price at the well or the price the gas would bring in a market remote from the well. We think it reasonable to assume that the parties intended that, if there was a market for gas in the field, the current market price there should be paid."

In this case, the issue was whether the price in the field, or at a point far distant from the field, should be paid. The Court took it for granted that the price in the field and at the well were synonymous.

In the case of *Sartor v. United Carbon Co., 182 La. 287, 163 So. 103*, the same Court said:

> "This Court, in the case of Wall v. United Gas Public Service Co., 178 La. 908, 152 So. 561, held that the language in the lease which required the royalty to be paid on the basis of the market price at well was synonymous with the market price at the field where the gas was produced."

The Supreme Court of Louisiana clearly saw how impossible it would be to have one price at the well and another in the field of which the well was a part.

Hence the District Court was in error in permitting any evidence as to delivery costs.

8.

Appellee's Evidence as to Gathering Lines.

If the Court were to permit appellee to deduct from the price it received from the pipe lines, the cost of transporting the gas from the well it would be incumbent on appellee to prove this cost with legal certainty, since the facts are peculiarly within its knowledge. This appellee completely failed to do in the case at bar. We feel that the District Court treated appellant very badly in this matter.

Appellee first offered in evidence testimony of its book-keeper, Mr. Taylor that it costs 1.834 cents per MCF to get gas from the well to the point of delivery to pipelines in the Richland gas field. (Tr. 72). He testified (Tr. 77) this was the cost from the well to the delivery point. Appellee produced the figures in a statement, marking it as cost of pipe line operation, and the District Court permitted this to be offered in evidence as defendant's exhibit No. 26 (Tr. 76, 313-319). On cross-examination it was shown that these statements were absolutely false and untrue. First it was shown that

these figures are not copied from appellee's books, but are mere guesses of the witness, as the books do not show what the cost of transportation is, separate from other costs (Tr. 77-78). Next it was shown that this statement contains many items besides the cost of carrying gas in the pipe line from the well to the delivery point, as is shown by Mr. Taylor's testimony (Tr. 77-79). Included is the entire cost of the measuring stations, the general supervision of the field, etc. Mr. Taylor admits (Tr. 78), that the heading in the statement: "Cost of Operating Pipe Lines," is incorrect. Yet, after we had proved by appellee's own witness that these figures were all wrong and the statements in them false and untrue, the District Court permitted this statement to be read to the jury (Tr. 79-81). All of this was of course over appellant's objections. To cap the climax, the District Judge, in the charge to the jury (Tr. 356), ordered them to deduct from the pipe line prices, if they reached to them, the cost of transportation, which could only mean this false and untrue statement, as there was no other evidence in the record on the subject.

9.

Gasoline.

Appellant's petition alleges (Tr. 15, 20), that the gas produced as sued on in this suit, contained gasoline, which was extracted and sold by appellee. Appellant therefor claimed royalty of ⅛ on the market price of this gasoline, or in the alternative, all the gasoline.

Appellee moved *"in limine" to strike these allegations* (Tr. 28), and the District Court struck out of Appellant's petition, all claims for gasoline (Tr. 43).

This seems clearly reversible error.

The lease contract sued on (Tr. 22) provides that appellee is allowed to take oil and gas from appellant's land. If this gasoline does not come under the head of oil and gas, appellee is entitled to none of it, and appellant should recover the full value of the gas. If this gasoline is part of the gas, appellee is entitled to it on paying appellant royalty of 1/8 of its market price. Under no theory could appellee, lessee, take this gasoline and pay lessor nothing.

But this question is squarely settled by the law and jurisprudence of Louisiana. *Act 252 of 1924, section 13 (Dart Sec. 4783)*, reads as follows: "Gas means natural gas as it is taken from the earth, including any gasoline content it may have, but it does not include casing-head gas."

In two cases, *Coyle v. La. Gas & Fuel Co., 175 La. 990, 144 So. 737* and *Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561*, the Supreme Court of Louisiana has expressly held that under a lease like this, lessor is entitled to one-eighth of the market price of the gasoline extracted, less the costs of extraction.

In the face of the gross injustice of failing to give appellant, as lessor, anything for the gasoline produced from his land; the plain reading of the lease, and the express law and jurisprudence of Louisiana; how can it possibly be said that the District Court did not commit reversible error in denying to appellant the right to prove anything on this subject.

We earnestly suggest that appellant, and all other land-owners, are entitled either to this royalty, or to a clear, complete statement from the Court as to why the above argument is unsound or authorities not pertinent. This has never been done by the District Court.

CONCLUSION

The issues in this case are important, because a vast number of leases are being made in Louisiana now in which the royalty provision is the same as in the case at bar.

Clearly the Court should provide the simplest possible way to determine the market price of gas. We respectfully suggest that this must be solely and entirely by considering the sales of gas in the field where produced.

Taking the sales of gas produces a rule by which both parties come before the Court on terms of equality, because the land-owner can ascertain the sales as well as the expert gas or oil companies. Under the rules laid down by the District Court in this case, it is practically impossible for a land-owner to litigate with an expert gas or oil company.

For the errors pointed out above, we ask that the judgment of the District Court be reversed and a new trial granted.

Respectfully submitted,

G. P. BULLIS,
Attorney for Appellant.

JUL 17 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 127

J. H. HEMLER,

Petitioner,

versus

HOPE PRODUCING COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI.

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May It Please the Court:

STATEMENT OF THE CASE.

Plaintiff, J. H. Hemler, instituted the present suit in the District Court for the Western District of Louisiana, seeking judgment against defendant for the sum of $12,-719.15, consisting of the following items, namely:

1/8th of 3.6c per 1000 cubic feet, in addition to the 3c already paid, on 1,695,542,-000 cubic feet, corrected to 2 lbs. above atmospheric pressure, as shown in paragraphs 4 and 5 of plaintiff's petition	$7,629.94
1/8th of 2c per 1000 cubic feet for gasoline extracted prior to sale, as shown in plaintiff's petition	4,626.56
Severance tax improperly deducted as recited in plaintiff's petition	462.65

Defendant appeared specially and first filed a motion to strike:

> (a) The allegations of plaintiff's petition dealing with the question of the demand for additional royalty on natural gas because the allegations of plaintiff's petition sought to recover the value of the gas, not at the well, but at points distant from the well, which allegations it was contended were inconsistent with the obligations of the defendant under the mineral lease, forming the basis of the action;
>
> (b) All allegations seeking to recover for royalty on the gasoline extracted from the natural gas produced from plaintiff's property; and,
>
> (c) All allegations dealing with the question of the right of plaintiff to recover for severance taxes, to the extent that such severance taxes were applicable to plaintiff's royalty interest in the gas. (R. 28-32).

Defendant likewise filed a plea in bar and plea of estoppel and acquiescence levelled at the proposition that plaintiff had, over a long period of time, accepted remittances for the gas produced by defendant, based on a market value of 3c per m. c. f., which remittances were tendered in full payment of all obligations of defendant to plaintiff, and that same were accepted and retained by plaintiff without protest. (R. 33-38).

Defendant likewise appeared specially and plead prescription (statute of limitations) of three years in bar of plaintiff's demands. (R. 38-39).

Defendant also filed a motion for a bill of particulars, seeking to have plaintiff set up the amount of gas for which he sought to recover in monthly quantities rather

than annual quantities, as set forth in plaintiff's petition. (R. 40-41).

In addition defendant filed an exception of no cause and no right of action.

When these motions were argued and submitted, judgment was rendered by the court, sustaining the motion to strike as to the demands for severance taxes and the value of gasoline, but referring the plea of estoppel and the plea of prescription to the merits. (R. 42-43). Order was entered in accordance with the rulings of the court. (R. 43-44).

Thereafter, upon reconsideration, the plea of prescription was reopened, (R. 44-45) and, upon conclusion of the trial, was sustained by the trial judge as to all of plaintiff's demand which matured more than three years prior to the institution of plaintiff's suit.

Plaintiff has taken no exception to the rulings of the court striking the demand with reference to severance tax and sustaining the plea of prescription; has assigned no error with reference thereto; and, therefore, has acquiesced in the action of the trial court in connection therewith.

Since plaintiff's suit was filed on August 5, 1935 (R. 21), all of his claim which accrued prior to August 1, 1932, is barred by the prescription of three years. Reference to the allegations of paragraph 4 of plaintiff's petition (R. 14) will show that by far the greater part of the gas produced by defendant from plaintiff's land was produced prior to August 1, 1932. Therefore, the amount in-

volved in the present suit, after eliminating the demand for severance tax and the additional amount demanded for gasoline royalties and applying the prescription of three years, will amount roughly to between $1,000.00 and $2,000.00.

Defendant answered admitting that it had drilled a well on plaintiff's land, from which it had produced gas; that for all gas which it had so produced, it had paid plaintiff a gas royalty equivalent to 1/8th of 3c per m. c. f., less plaintiff's proportionate part of the severance tax due thereon; that said price of 3c per m. c. f. represented the actual market value or market price at the well of all gas withdrawn by defendant from plaintiff's land; and that, therefore, defendant was in nowise indebted unto plaintiff. (R. 45-57).

Upon the issues, so made up, the case went to trial before a jury, which returned a verdict in favor of defendant in the following language, to-wit:

> "We, the jury find for ----- For the Defendant." (R. 382)

upon which, judgment was entered and, from said judgment, plaintiff prosecuted his appeal.

ARGUMENT.

The grounds upon which petitioner predicates his claim for a writ of certiorari are tersely set forth in paragraphs numbered 2, 3 and 4, appearing on pages 8 and 9 of the printed petition as filed with this Honorable Court. We shall deal with these contentions in the same order in which they have been asserted by petitioner.

I.

ANSWER TO PETITIONER'S ARGUMENT ON FIRST POINT.

The first ground upon which petitioner contends for the allowance of a writ of certiorari is set forth by him in the following language:

> "The decision of the Court of Appeals, denying to petitioner any royalty on the gasoline produced under the lease sued on, is in conflict with the decisions of the highest local court, the Supreme Court of Louisiana, as shown by the following decisions:
>
> "Coyle v. Louisiana Gas & Fuel Co., 175 La. 990, 144 So. 737;
>
> "Wall v. United Gas P. S. Co., 178 La., 908, 152 So. 561.
>
> "Said decision also seems contrary to equity and the contract, by permitting respondent to take gasoline from petitioner's land and pay petitioner nothing for it." (Petitioner's Application and Brief, page 8).

Petitioner is in error in asserting that the decision of the United States Circuit Court of Appeals is in conflict with the two decisions of the Supreme Court of the State of Louisiana in the cases cited by petitioner.

On the same day that the Circuit Court of Appeals handed down its opinion in the case of *Hemler v. Hope Producing Company, 117 Federal (2d) 231*, it likewise rendered an opinion in a companion case, *Union Producing Company v. Pardue, 117 Federal (2d) 225*, involving issues almost identical with those involved in the *Hemler v. Hope Producing Company* case.

In the opinion rendered in the *Pardue* case, the Circuit Court of Appeals dealt at length with the question of the right of a lessor, after he had been paid a full royalty on the gas, based upon its market value at the well, to likewise participate in the proceeds derived from the sale of natural gas gasoline extracted from this gas after the gas had been gathered and transported to a distant point and there processed for the purpose of extracting this gasoline.

In the opinion just referred to, the Circuit Court reviewed the two decisions of the Louisiana Supreme Court relied upon by petitioner in his application for a writ of certiorari, and pointed out the distinction between the issues involved in those two cases and the issues involved in the case then at bar.

That this Honorable Court may have before it the discussion of these cases and the reasoning of the Circuit Court of Appeals, we quote from the opinion of the Circuit Court in the *Pardue* case as follows *(117 F. (2d) 228-9)*:

> "Here cross appellant in support of his claim relies on the statutory definition of natural gas, ' "Gas" means natural gas as it is taken from the earth, including any gasoline content it may have, but it does not include casinghead gas,' and on Coyle v. Louisiana, etc., Co., 175 La. 990, 144 So. 737, and Wall v. United Gas, Etc., Co., 178 La. 908, 152 So. 561. We might dispose of the cross action by a mere reference to our holding in the Arkansas Natural Gas Corp. v. Sartor, 5 Cir., 98 F. 2d 527, that the contract did not entitle plaintiffs to royalties based on the value of the gasoline extracted from the gas. But, in view of cross appellant's insistence that the matter is ruled otherwise in Louisiana, in the Coyle and Wall cases, we will point out that this is not so and why.

"The statute cross appellant invokes makes against, not for, his position. It expressly declares that the term gas means natural gas as it is taken from the earth including any gasoline content it may have, and leaves no question but that the sale of gas carries to the purchaser all, not part, of its content. Cf. The Coyle and Wall cases, supra, and Humble Oil & Refining Company v. Poe, Tex. Com. App., 29 S. W. 2d 1019; Lone Star Gas Co. v. Stine, Tex. Com. App., 41 S. W. 2d 48, 82 A. L. R. 1299; Wilkins v. Nelson, 155 La. 807, 99 So. 607. It is true that in the original opinion in the Coyle case (175 La. 990, 144 So. 739), the court said, 'We find nothing in the record to warrant the belief that the lease under review contemplated that defendant should be allowed to take the gasoline, a product of much greater value than the gas, from the leased premises by merely paying him for one-eighth of the gas. If its gasoline content is not regarded as included in the gas within the meaning of the contract, then, obviously, defendant is not entitled to it, or any part of it. If it is so regarded, then one-eighth of it is due plaintiff by virtue of the agreement.'

"Aside from the fact however that no issue was made of this point in the case, it being conceded that under the lease contract plaintiff was entitled to 1/8 of the gasoline and the suit being only with regard to whether plaintiff could get this 1/8 of the gasoline without paying any part of the cost of its extraction, the conditions in the field involved and the terms of the lease were entirely different from those here. There, the gas was so rich in gasoline with one and a half to two gallons per 1,000 feet, that it was worthless unless the gasoline was first extracted. This was recognized by both parties, and the lessee from the beginning accounted to plaintiff for 1/8 of the gasoline. But more important, the lease there was not as here, one in which

the lessor sold the gas to lessee at the well. There was no provision in that lease for sale of the gas. There, the provision was that the lessee would 'pay the lessor one-eighth royalty for the gas from each well where gas only is found, while the same is being used off the premises.' Under such a provision, it was the duty of the lessee, absent an agreement for its purchase, to deliver to the lessor in kind, gas, gasoline, or whatever was made from the gas issuing from the well, or to account to him for his 1/8 of the proceeds of all sales. Here, the title to the gas passes to lessee at the well, lessee being obligated to pay lessor the value of it there. In the opinion on rehearing in the Coyle case, the true issue in the case was made clear. The court saying: 'The true issue * * * is whether plaintiff, as lessor, is entitled to be paid his proportionate part of the net sale price, or of the gross sale price, of the gasoline extracted from the gas, due him as royalty, produced from gas wells on the lease', held that as owner of the gasoline, lessor must pay his share of the expenses and must be settled with on the basis of the net sale price after expenses paid. In Wall's case, the lease provided as the lease here does, that the grantor should be paid 1/8 of the value of the gas calculated at the market price, but the conditions in the field as to the strong impregnation with gasoline were the same as those in the Coyle case, and as in that case, the lessee from the beginning had recognized the right of the lessor to an interest in the gasoline. There the lessor contended not for 1/8 but for all of the gasoline and when the case reached the Supreme Court, two main questions and one secondary one were raised, posed and decided there. First, as to what was the meaning of the terms 'market prices' as used in the lease, second whether the lessor under the lease providing for a 1/8 royalty interest 'is entitled to all the gasoline extracted from the gas or only 1/8 of it,' and

third, the question decided in the Coyle case, whether plaintiffs were entitled to the gross value of 1/8 of the gasoline, or its net value after costs of extraction had been paid.

"Plaintiff, in this case, having in his primary pleading alleged that lessee was entitled to and had bought all of the gas which came from the well and as a result of that purchase was liable to him for the full value of 1/8 of it, the district judge was right in holding that he could not add to the claim for that full value, another claim for two cents per 1,000 feet more, because the purchaser of the gas had extracted gasoline from it. Plaintiff's appeal presents no error. The judgment is affirmed as to both appeals."

Act 252 of the Louisiana Legislature for the year 1924, in section 13, defines natural gas in the following language:

"* * *; 'gas' means natural gas as it is taken from the earth, including any gasoline content it may have, but it does not include casing-head gas; * * *"

The lease which was executed by Mr. Hemler, under the terms of which Hope Producing Company produced natural gas, contains a royalty provision with respect to natural gas in the following language:

"To pay the lessor two hundred dollars each year for each well producing gas only, until such time as the gas shall be utilized or sold off the premises, and at that time the royalty above mentioned shall cease, and thereafter the grantor shall be paid one-eighth (1/8) of the value of such gas calculated at the rate of market price cents per thousand cubic feet, corrected to two pounds above atmospheric pressure, and lessor to have gas free of cost from any such well for all stoves and all inside lights in

> the principal dwelling house on said land during the same time by making his own connections with the wells at his own risk and expense." (R. 23).

From this it will be seen that the natural gas royalty reserved by lessor, Hemler, in his lease, was not payable in kind, but was 1/8 of the value of the gas calculated at the market price. Under the settled jurisprudence of this state, the effect of this provision was to secure to the lessor the right to be paid for all natural gas produced from said well, including all of the elements thereof, one-eighth of the value of such gas at the wellhead.

Roberts v. United Carbon Company, 78 Fed. (2d) 39;
Arkansas Natural Gas Company v. Sartor, et al.; Sartor, et al., v. Arkansas Natural Gas Company, 78 Fed. (2d) 924;
Sartor v. United Gas Public Service Company, 84 Fed. (2d) 436;
Wall v. United Gas Public Service Company, 178 La. 908; 152 So. 561;
Sartor v. United Carbon Company, 183 La. 287; 163 So. 103;
Sartor v. United Gas Public Service Company, 186 La. 555; 173 So. 103.

Upon the trial of the case, the District Judge charged the jury in the following language:

> "If you find for plaintiff in answer to all of the preceding questions, then you should answer the following question:
>
> " 'We, the jury, find the market value of gas at the well in the Richland Parish gas field for the year 1932 to December 31st . . . cents per thousand cubic feet, for the year 1933 . . . cents per thousand cubic feet and for the year 1934 . . . cents per thousand cubic feet, all at a pressure of two pounds above atmospheric pressure of 14.4.' " (R. 379-380).

As stated above, the jury found for the defendant, which constituted a finding that 3c per m. c. f. represented the market value of gas at the well during the period involved in the law suit.

We believe that counsel for petitioner concedes that this is the only issue in the case, as in his brief, filed in the United States Circuit Court of Appeals, he says:

> "Your Honors will note that this case presents identically the same facts and issues as cases Nos. 9493 and 9499, submitted at the same time.
>
> "In each of these cases, the same narrow issue is presented, namely, what is the market price of natural gas in the Richland gas field, in Richland Parish, State of Louisiana." (Petitioner's application and brief, page 37).

If plaintiff was paid one-eighth of the market value at the well-head for the gas produced from the well located on his property, including all of its elements (the jury found that he had been paid in full), then clearly plaintiff is not entitled to again be paid for one-eighth of the value of some one of these elements which was subsequently extracted from this gas at a distant point at a gasoline absorption plant. If so, he could just as successfully contend that he would likewise be entitled to one-eighth of the butane or methane which might be subsequently extracted from this gas, or one-eighth of any or all of the other elements of the gas that might subsequently be derived from it through some process of manufacture or extraction.

We submit that the statement of the Circuit Court of Appeals in the *Pardue* case, above quoted, to the effect

that plaintiff, after having been paid one-eighth of the full value of the gas as it was produced from the well, is without right to add to his claim for the full value another claim for a proportionate part of the gasoline which might be subsequently extracted from the same gas, for which plaintiff had been paid in full, correctly states the law of the case.

We, therefore, submit that the decision of the Circuit Court of Appeals is not only consistent with the jurisprudence of the State of Louisiana, but is the only decision which could be rendered consonant with law and equity.

II.

ANSWER TO PETITIONER'S ARGUMENT ON SECOND POINT.

The second ground upon which petitioner contends he is entitled to the allowance of a writ of certiorari is set forth by him in the following language:

> "The decision of the Court of Appeals, denying that the market price contemplated by the parties, and the market price to be used in this suit, is the market price in the field where produced, there being no sale at the well involved in this suit, is in conflict with the decision of the Supreme Court of Louisiana in the following cases:
>
> Wall v. United Gas P. S. Co., 178 La. 908, 152 So. 561;
>
> Sartor v. United Carbon Co., 183 La. 287, 163 So. 103." (Petitioner's application and brief, pages 8 and 9).

Petitioner is contending in this Court, as he contended in the District Court and Court of Appeals below,

that the decisions of the Louisiana Supreme Court in the opinions rendered in the cases of *Wall v. United Gas Public Service Company* and *Sartor v. United Carbon Company*, held that leases providing for a gas royalty of one-eighth of the market value thereof meant not market value at the well-head, but market value at some distant point to which the lessee might transport the gas and there sell it at some appreciated price which included compensation for the gathering and transportation thereof and other elements entering into such sale prices.

A reading of the two cases cited by petitioner will at once show that the petitioner's construction of these decisions is erroneous.

Should there, however, be any uncertainty as to the meaning of the Louisiana Supreme Court in the cases relied upon by petitioner, then we refer your Honors to a later decision of the Louisiana Supreme Court rendered in the case of *Sartor, et al., v. United Gas Public Service Company, 186 La. 555, 173 So. 103*, decided on February 1, 1937, wherein the Louisiana Supreme Court was again called upon to construe the meaning of a provision with reference to the royalty on natural gas which provided that:

> "'* * * grantor shall be paid one-eighth (1/8) of the value of such gas calculated at the rate of not less than three cents per thousand cubic feet, corrected to two pounds above atmospheric pressure.'"

The court interpreted this provision as it had in the prior decisions rendered by it and held *(186 La. 559, 173 So. 105)*:

> "Where there is no stipulation to the contrary in a lease contract of this kind, 'market value' is under-

stood to mean the current market price paid for gas at the well or in the field where it is produced. Wall v. United Gas Public Service Company, 178 La. 908, 152 So. 561; Sartor v. United Carbon Company, 183 La. 287, 163 So. 103, 104."

In discussing this conclusion, the court went on to say *(186 La. 562-7, 173 So. 106-7)*:

"It is argued on behalf of the plaintiffs that the prices received by the producers from the pipe-line companies should be accepted as the 'market value' of the gas in the field, as that term is used in the lease contract. The trial judge was not impressed with this argument. Neither are we.

"The testimony shows that there are two large gas fields in North Louisiana, one known as the 'Richland field' and the other as the 'Ouachita field.' The Richland field comprises an area within the parish of Richland, where the record shows that innumerable oil and gas leases have been granted by landowners. This field has been extensively developed and is, or was at one time, one of the greatest gas-producing areas in the South. Just how many gas-producing wells there are in this field is not shown. The Ouachita field is much larger in area, comprising parts of the parishes of Ouachita, Morehouse and Union. This field is also highly developed, there being therein literally hundreds of producing wells.

"These two fields, comprising parts of the four parishes, Richland, Ouachita, Morehouse, and Union, all grouped together in the extreme northern portion of this state, taken together embrace within their limits territory which is said to be one of the largest, if not the largest, natural gas-producing areas of the entire country. For several years there has been produced and is yet being produced in these fields vastly more natural gas than can be dis-

posed of and consumed in local markets, the result being that a market for the gas has been sought in regions far beyond the borders of this state. There is testimony in the record showing that gas from these fields is piped as far north as St. Louis and as far east as Atlanta. Millions of dollars have been spent in the construction of pipe lines to convey the gas to foreign markets. The corporations which built these pipe lines make contracts for the sale of gas to consumers in the territory adjacent to and at the ends of the lines, and in order to comply with their contracts, they in turn contract with producers to furnish the gas delivered into their pipe lines. The contracts between the producers and the pipe line companies run over periods of ten to fifteen years, the producers being obligated to furnish such amounts of gas as the pipe line companies may demand, usually within minimum and maximum limits.

"In order to supply the gas, the producers must maintain, at enormous expense, what are known as 'gathering systems,' which involve every expense from the purchasing of the leases to the laying of the lines to convey the gas from the wells to the pipe lines, the cost of meters to be installed at the pipe lines where the gas is delivered, the expense of their installation, the cost of keeping a clerical force to read the meters, calculate the amount of gas delivered, keep books, and make monthly reports to the purchasers.

"We have read all the contracts introduced and find that as relates to the obligations assumed by the producers, they are almost identical, about the only difference being as to the minimum and maximum amounts of gas to be delivered. In sum, here is what the producers obligated themselves to do:

"First, to deliver a specified 'annual minimum' amount of gas to the buyer and be prepared to de-

liver up to twice this amount upon the demand of the buyer. The annual minimum is subject to upward revisions as specified in the contract, the buyer being at all times entitled to demand a maximum amounting to twice the agreed minimum.

"Second, if deliveries for any reason fall below the amount agreed upon, the producer has a specified number of days in which to take steps to correct the deficiency and a specified number of days in which to resume delivery of the full amount. If the deficiency remains uncorrected after the specified number of days, the buyer is not obligated to take the full amount contracted for; and at the expiration of two years, the deficiency persisting, the buyer may cancel the contract.

"Third, to deliver all gas to two receiving stations, one in the Ouachita field and one in the Richland field. The producer or seller must provide, and maintain meters, pressure gauges, and other equipment for measuring and recording the amount of gas delivered, and must keep accounts and render monthly statements to the buyer.

"Fourth, seller must warrant title to all gas it delivers and must indemnify the buyer in case of judgments arising out of title or royalty litigation. It must pay production and severance taxes.

"By thus binding themselves under these contracts, the producers or vendors of the gas take all the risks and assume heavy burdens. They are required to make contracts extending over long periods of time, which involve the hazard or gamble that the wells and the territory then producing gas will continue to produce until the end of the term, which the testimony shows is always uncertain. If the wells for any reason cease to produce, and many wells do, according to the testimony, the producers must drill others. They are required by the pipe line companies, the purchasers, to deliver during

each year a minimum amount of gas, and at the option of the purchasers, double that amount. The producers have no way of knowing what amount of gas the purchasers will demand above the minimum stipulated in the contract, and for that reason it is necessary for them to stand ready at all times to deliver not only the minimum, but the maximum if called upon to do so.

"There is a wide range or margin between the minimum and the maximum amounts stated in the contracts. So that the producers, in order to be able during the life of the contracts to comply with their obligations to supply the maximum if the demand is made upon them, are compelled, in effect, to hold in reserve vast quantities of gas which may never be demanded. By that we mean that it is necessary for the producers to be prepared to deliver, not only the amount of gas which the purchasers are required under the contracts to take, but such additional amount up to the maximum as the purchasers may at their option demand. They must make preparations to deliver gas which may never be called for.

"The drastic 'stand-by' requirement in these contracts adds greatly to the expense of carrying them out. The testimony shows that the guaranty on the part of the producers to deliver, on demand, large quantities of gas above the minimum, formed part of the consideration for the prices paid by the pipe line companies.

"We have said that the pipe lines extended into the Richland field. By that we do not mean that they were laid up to or even near to each of the wells in the field. The so-called 'field' extends over a wide area with wells in every part of it. The pipe lines extend to a point in or near each of the fields where there are installed receiving or delivery stations. The purchasers pay for no gas except that which is delivered.

"These plaintiffs assumed no responsibility, guaranteed nothing, took no risks, and shared none of the expense of gathering and delivering the gas to the purchasers.

"Plaintiffs' theory that these pipe line prices should be accepted as the basis for settlement with them is unsound. Under their contract they are entitled to payment for their royalty interest in the gas based upon the 'market value' at the place where it is reduced to possession and ownership, where title vests, which is at the well, not at some distant point in the 'field' or elsewhere, to which it is transported for sale and delivery to the pipe lines. This was made clear in the case of Wall v. United Gas Public Service Company, supra.

"In the case of Sartor v. United Carbon Company, supra, plaintiffs contended that they should be paid according to the market value of the gas in the 'parish' and not the value at the well, and after citing the Wall case we said:

" 'The obvious reason why the market price at the well or field where the gas is obtained cannot be said to cover the market price in the parish where the gas is produced is because of the transportation charges which would necessarily augment the market price in the parish above the market price at the well or field. The clauses of the lease are clear from ambiguity and doubt and constitute the law between the parties.'

"The theory that royalty owners should receive settlements based upon pipe line prices has been rejected by the federal court in two recent cases.

"Arkansas Natural Gas Company v. Sartor (C. C. A.) 78 Fed. (2d) 924, 928; Sartor v. United Gas Public Service Co., (C. C. A.) 84 F. (2d) 436, 440."

It will thus be seen that both the Louisiana Supreme Court and United States Circuit Court have on several occasions held that, under a mineral lease containing a provision with respect to the payment of gas royalties, practically identical with the provisions of the lease in contest in the present suit, the lessor is only entitled to one-eighth of the market price or market value of the gas at the well from which it is produced and is not entitled to one-eighth of the amount that the lessee derives for said gas after gathering same and transporting it to some distant market.

It will be noted that the Louisiana Supreme Court, in its decision from which we have just quoted, interprets its decisions rendered in the *Wall* case and *Sartor* case, cited by the petitioner, in the same manner that they are interpreted by the United States Circuit Court of Appeals, and in a manner opposite to that in which they are interpreted by petitioner.

We respectfully submit that the foregoing clearly demonstrates that the decision of the United States Circuit Court of Appeals is not in conflict with the jurisprudence of the Supreme Court of the State of Louisiana, but is in accord therewith.

III.

ANSWER TO PETITIONER'S ARGUMENT ON THIRD POINT.

The third ground upon which petitioner contends he is entitled to the allowance of a writ of certiorari is set forth by him in the following language:

> "The Court of Appeals departed from the accepted and usual course of judicial proceedings, and denied

> to petitioner due process of law, by completely failing to consider or decide the issues laid before it by petitioner as appellant in that Court, as hereinabove recited.
>
> "The opinion of the Court of Appeals refers to its decision in the following cases decided the same day:
>
> "Union Producing Co. v. Pardue, 117 Fed. (2d) 225; Union Producing Co. v. Driskell, 117 Fed. (2d) 229;
>
> "Neither of these cases involved the same issue as in the case at bar and in neither of them were any of these issues discussed, except as to gasoline in the Pardue case." (Petitioner's application and brief, page 9).

Under this heading petitioner claims that the Circuit Court of Appeals failed to pass upon issues tendered to it, because it disposed of certain of those issues by referring to decisions rendered in two other cases decided on the same day. Petitioner, in his application for a writ in this Court, under his third point, states:

> "Neither of these cases involved the same issue as in the case at bar and in neither of them were any of these issues discussed, except as to gasoline in the Pardue case."

In connection with this contention, we state, with all due respect to counsel for petitioner, that he is misstating facts and is endeavoring to mislead this Honorable Court.

In substantiation of this assertion, we refer your Honors to the brief filed by counsel for petitioner in the Circuit Court of Appeals, a copy of which is attached to

petitioner's application in this court as an appendix. In said brief, counsel stated:

> "Your Honors will note that this case presents identically the same facts and issues as cases Nos. 9493 and 9499, submitted at the same time.
>
> "In each of these cases, the same narrow issue is presented, namely, what is the market price of natural gas in the Richland gas field, in Richland Parish, State of Louisiana." (Petitioner's application and brief, page 37).

We believe this statement by counsel in his brief filed in the United States Circuit Court of Appeals is sufficient to demonstrate that the third ground upon which he bases his application for a writ of certiorari is not serious and can be dismissed without further consideration.

Conclusion.

We, therefore, respectfully submit that petitioner has not made out a case entitling him to a writ of certiorari and that his application should be denied.

Respectfully submitted,

HENRY P. DART, JR.,
ALDEN T. SHOTWELL.

Of Counsel:

DART & DART,
SHOTWELL & BROWN.

(12)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 127

J. H. HEMLER,
Petitioner,

versus

HOPE PRODUCING COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT.

G. P. BULLIS,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

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REPLY BRIEF OF PETITIONER TO BRIEF OF RESPONDENT.

May It Please the Court:

Respondent, Hope Producing Co., has filed a brief in opposition to our application for writ of certiorari, which seems so misleading and confusing, that we beg to submit a short reply.

The basic facts in this matter are simple and entirely undisputed, as follows:

Petitioner, J. H. Hemler, leased his farm to respondent for oil and gas development, by a lease in form customarily used in Louisiana and elsewhere, stipulating that petitioner receive 1/8th of the market price of any gas produced.

Respondent, a subsidiary of Standard Oil Company of New Jersey, sold all the gas it produced in the field, (after first extracting the gasoline), by private sale, for an average of 4.832c per thousand cubic feet, and the other producers sold mostly for about the same price, all of these sales being made and delivered in the field, right in the midst of the gas wells where it was produced. Then respondent attempted to settle with petitioner, who was ignorant of such sales, by paying him on the basis of 3c as the market price.

In the reply brief, respondent does not squarely meet or discuss any of the issues raised in our application and original brief. May we show how they answer, or fail to answer, the three reasons we assigned for granting of writ.

I.

Our first reason was that the Court of Appeals failed to follow the established local jurisprudence, by denying to petitioner any royalty on gasoline.

The facts on this point are simple and undisputed. When natural gas comes out of the ground in the well, it contains gasoline, studded thru the gas. This gasoline, being very valuable, is first extracted, then the gas, (called dry gas after gasoline extraction), is sold, and is the gas used in commerce and homes. All of the sales and prices stated in this record and briefs, are for this dry gas. Natural gas with gasoline in it is not usable.

Since the lease contract stipulates that the landowner shall receive 1/8th of all that is produced from the well, obviously he should receive 1/8th of this gasoline.

We quoted in our original application, the jurisprudence of the Supreme Court of Louisiana, in the *Coyle* and *Wall* cases, expressly holding that the landowner is entitled to 1/8th of this gasoline.

Respondent's brief does not mention or discuss these cases, which is an admission that such is the jurisprudence of Louisiana.

Respondent's brief merely quotes in full the opinion of the Court of Appeals quoted in our original application, and which we here urged as error.

The opinion of the Court of Appeals, unless this Court intervenes, takes away from land owners all royalty on gasoline. A decision which thus takes millions of dollars out of the pockets of little farmers and land-owners, and puts them into the pockets of the big oil and gas companies, should be clear, explicit, and explain beyond any uncertainty why the Federal Court fails to follow the local jurisprudence. In all respect we suggest that the opinion of the Court of Appeals on this issue of gasoline, quoted at page 13 of petitioner's brief and at page 6 of respondent's brief, does not show these desiderata.

As this is one of the opinions for which we here ask review, we beg to submit a short analysis.

This opinion of the Courtof Appeals begins by mentioning a statute of the State of Louisiana, that the word "gas" used in a lease like the one in the case at bar, includes the gasoline content. The Supreme Court of Louisiana, in the decision quoted in our first brief, used this

to bolster their holding that the landowner was entitled to royalty on gasoline. The Court of Appeals states that this statute makes against, not for, our claim because it declares that the sale of gas carries to the purchaser all, not part, of its content.

We respectfully suggest that this statement of the Court of Appeals is obscure and not understandable. No issue is before the Court as to what a sale of gas carries to a purchaser. What bearing this has on petitioner's claim for gasoline royalty under a lease, is not explained by the Court. Neither does the Court explain why it construes this statute as against petitioner's claim, when the Supreme Court of Louisiana construes it as sustaining petitioner's claim.

Next the Court of Appeals opinion states that in the quoted cases before the Supreme Court of Louisiana, no issue was made as to the landowner being entitled to royalty on gasoline, it being admitted by both sides that the landowner was so entitled. Certainly the fact that in the State Court, both parties admitted that the landowner was entitled to royalty on gasoline, is overwhelmingly in our favor, instead of against us as the Court of Appeals holds. The Court of Appeals makes no explanation of its holding on this point.

Next the Court of Appeals states that in the *Coyle* case, the gas contained much more gasoline than in the case at bar. Why a landowner should be entitled to royalty on gasoline when the gasoline content is high, and not entitled when the gasoline content is lower, the Court does

not explain, and no reason for such a distinction seems possible.

Next the Court of Appeals states that in the lease at bar, the lessor sold to the lessee the gas at the well.

This seems a clear error as to the fundamental nature of an oil or gas lease. Lessor does not sell any gas to lessee. Lessor sells, in a mineral lease, the right to go on land and drill for oil or gas, and the right for the lessee to take any oil or gas produced, and pay lessor an agreed royalty. This is very different from lessor selling to lessee. The conception of a lease, by the Court of Appeals, as a sale of gas from lessor to lessee, is a novel doctrine, never before enunciated so far as we can find. It is contrary to the express language of the lease. It will most certainly lead to trouble as a precedent. Lessor could not possibly sell gas to lessee, because lessor never had any gas to sell. There was no gas anywhere until lessee produced and used it.

Furthermore, this dictum of the Court of Appeals seems entirely foreign and irrelevant to the case at bar. The issue here is solely what compensation lessor should receive. Whether lessor sold the gas to lessee, or whether lessee took it by right of a lease, is immaterial.

Next the Court of Appeals mentions the *Wall* case, cited in our original brief, and recites that the Supreme Court of Louisiana decided that lessor was entitled to 1/8th of the gasoline, just as we claim; but strange to say, the Court of Appeals assigns no reason whatever why it

refuses to follow the decision of the Supreme Court of Louisiana in this *Wall* case. The Court of Appeals does say that the gas involved in the *Wall* case had the same strong impregnation of gasoline as in the *Coyle* case. As we have shown above, this would be immaterial if true, but it is not true. The gas in the *Wall* case contained .5 gallons of gasoline per thousand cubic feet *(152 So. 562)*. The gas in the case at bar contained .4 gallons of gasoline per thousand (Record, p. 20). Certainly no distinction can be made between the case at bar and the *Wall* case on such a basis.

Lastly, the opinion of the Court of Appeals refers to the primary pleadings in the case. The Court of Appeals was not here referring to the case at bar, but this opinion was written in another case, the *Pardue* case, and brought into the case at bar only by reference.

Certainly in the pleadings in this case, petitioner stated his claim clearly and brought out clearly the distinction between the claim for gasoline and for dry gas (Record, pages 15-20), and we respectfully refer the Court to that statement, in our original bill of complaint in the case at bar, for the full statement of this gasoline matter.

We ask your Honors to note that unless this Court intervenes, the above decision, of which we believe the above is a fair analysis, will take millions of dollars of gas royalties from landowners. We respectfully suggest that this Court can save an immense injustice by reviewing this decision.

The brief of respondent on this issue, closes with this extraordinary statement (Page 11),

> "If plaintiff was paid one-eighth of the market value at the well-head for the gas produced from the well located on his property, including all of its elements (the jury found that he had been paid in full), then clearly plaintiff is not entitled to again be paid for one-eighth of the value of some one of these elements which was subsequently extracted from this gas at a distant point at a gasoline absorption point."

We are surprised that the reputable attorneys for respondent would make such an untruthful, misleading, statement, apparently in an attempt to deceive the Court.

Long before the trial of this case in the District Court, the District Judge struck from our bill of complaint all claims for gasoline royalty (Record, page 43). Our complaint had asked for additional royalty on dry gas and for royalty on gasoline, and with gasoline stricken, the case proceeded and was tried solely on our claim for royalty on dry gas. No claim has ever been made that the 3c paid to petitioner included gasoline royalty, the position of respondent being that petitioner was entitled to nothing for gasoline.

Hence, the above quotation from respondent's brief, insinuating that petitioner has been paid for gasoline once, and is claiming a second payment, is contrary to the elementary, undisputed facts in the case, and a bald attempt to deceive the Court.

II.

Our second reason for asking for this writ is that the Court of Appeals disregarded the established local jurisprudence, that in a lease such as this, the market price to which the landowner is entitled under the lease, is the market price in the field where the gas is produced. As we showed in our application, the gas field is a comparatively small area of land, thickly studded with gas wells, and the gas is sold at various points within this small field.

We quoted two decisions of the Supreme Court of Louisiana which squarely and expressly establish this jurisprudence.

It is highly significant that respondent's brief does not dispute these decisions nor the jurisprudence they establish. The silence of respondent is the best proof that our contentions are correct.

All respondent has to say on this subject is a lengthy quotation from the case of *Sartor v. United Co., 186 La. 555, 173 So. 105*, by the Supreme Court of Louisiana.

As this quotation shows, that Court first reiterated their previous holdings, that the market price was in the field, then that Court entered into a lengthy discussion of the evidence introduced on the trial of that particular case. This is clearly irrelevant to the case here at bar.

Respondent's brief makes no attempt whatever to link this opinion up with the issues here. Obviously the evidence in one case is rarely the same as the evidence in another case, hence lengthy rulings on the admissibility of

evidence in one case have little bearing on another case. To show the irrelevancy of this lengthy quotation, it covers the admission in evidence of certain pipe line contracts. In the case at bar none of these contracts were put in evidence.

For good measure, respondent's brief on this point ends with the statement that petitioner claims the market price on gas transported to a distant point and there sold. This is absolutely untrue, as is shown by our repeated statements that what we claim is the market in the field, right among the wells where the gas is produced.

III.

Our third reason for asking for this writ was that the Court of Appeals completely failed to consider, mention or decide, the issues we laid before it on appeal.

Respondent's brief completely ignores all the details of this matter.

We ask the Court to note the great significance of this silence. The failure of respondent's brief to deny, that we laid before the Court of Appeals many issues, detailed in our application and original brief, and that the Court of Appeals completely ignored and failed to decide any of these issues, proves that we are correct in our claims.

Respondent's brief mentions only one small detail of the claims in our original brief and application. We there said that the two cases decided by the Court of Appeals on the same day they decided the case at bar, did not involve the same issues, in the Court of Appeals, as did the case at bar, and did not decide the issues which we stated

had not been decided, in the case at bar, except on the subject of gasoline which we quoted in our application.

Respondent asserts that this is a misstatement of fact, and that we are endeavoring to mislead this Court.

The two cases above referred to, decided the same day as the case at bar, are:

Union Producing Co. v. Pardue, 117 F. (2d) 225;
Union Producing Co. v. Driskell, 117 F. (2d) 229;

In making this serious charge against counsel for petitioner, it would naturally be supposed that respondent's brief would quote from these cases, to show that we were wrong in our statement. The brief does not even mention such quotation.

All respondent offers to prove this serious charge, is a quotation from petitioner's brief in the Court of Appeals to the effect that when these three cases were started, the issues laid in the bills of complaint were the same, namely, what was the market price of gas. In other words, in each of these three cases, different landowners claimed the same thing, namely, a fair deal on royalty.

However, while the issues in these three cases were the same when they were filed, they met with quite a different history after filing. In two of the cases, the jury in the District Court found in favor of the landowner, and the gas company appealed. In the case at bar, the jury found for the gas company and the landowner appealed to the Court of Appeals. Obviously, while the issues were the same at the start of these lawsuits, the issues on the appeal

in the Court of Appeals was very different. The issues in a case where plaintiff appeals are the opposite of the issues when defendant appeals.

A mere reference to the two cases above cited, shows that we were correct in our statement that the issues there decided were not the same as in the case at bar, and the gratuitous reflection on counsel for petitioner is grossly untrue.

ERROR.

In our original application for writ in this case, at page 3, we stated that the average price of sales was 3c to 4c. We should have stated this as 4c to 5c.

CONCLUSION.

We understand the purpose of having respondent in applications for writ, file a brief, is that the Court may have the benefit of the views of opposing counsel contradictorily.

In the case at bar, the remarkable fact that respondent's brief makes no serious attempt to dispute the facts and law stated in our application and original brief, proves conclusively that we are correct in our position. The Court does not have to take our assertions alone. They are backed up and proved true by the failure of respondent to deny.

We ask the Court specially to note that respondent does not deny the assertions in our application and original brief, as to the general importance of this case, and the large sums involved. As we there stated, the form of lease

in this case is the same as in countless other leases, widely used both in the State of Louisiana and elsewhere, hence the decision in this case settles the issues for thousands of landowners and millions of dollars in royalty.

If the decision of the Court of Appeals is allowed to stand, landowners lose millions of dollars in gasoline royalty. Probably more important is that the requirements of the Court for any suit they file are so impossible, technical, and dependent on expert testimony, as we showed in our original brief, that a landowner cannot file a suit regarding the amount due him, with any prospect of success, and must accept whatever the gas companies see fit to pay him.

We therefore humbly feel that this case is worthy of the attention of this mighty Court.

Respectfully submitted,

G. P. BULLIS,
Attorney for Petitioner.